

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
NORTHERN DIVISION

STUDENTS FOR FAIR ADMISSIONS,	) Trial Day 5
	)
Plaintiff,	)
	) Civil No.
vs.	) 1:23-cv-2699-RDB
	)
THE UNITED STATES NAVAL	) Baltimore, Maryland
ACADEMY, ET AL.,	)
	) September 20, 2024
Defendants.	) 10:12 a.m.
	)

TRIAL IN THE ABOVE-ENTITLED MATTER CONTINUED  
BEFORE THE HONORABLE RICHARD D. BENNETT

A P P E A R A N C E S

On Behalf of the Plaintiff:

ADAM K. MORTARA, ESQUIRE  
PATRICK STRAWBRIDGE, ESQUIRE  
J. MICHAEL CONNOLLY, ESQUIRE  
CAMERON T. NORRIS, ESQUIRE  
RACHAEL WYRICK, ESQUIRE  
R. GABRIEL ANDERSON, ESQUIRE  
THOMAS R. MCCARTHY, ESQUIRE

On Behalf of the Defendant:

JOSHUA E. GARDNER, ESQUIRE  
CATHERINE M. YANG, ESQUIRE  
ANDREW E. CARMICHAEL, ESQUIRE  
JOHN ROBINSON, ESQUIRE  
MEDHA GARGEYA, ESQUIRE  
CHRIS E. MENDEZ, ESQUIRE

Also Present:

EDWARD BLUM, STUDENT FOR FAIR ADMISSIONS  
BRUCE LATTA, NAVAL ACADEMY  
TRACEY URBAN, PARALEGAL  
LINDSEY O'CONNOR, PARALEGAL  
MICHEAL PUSTERLA, IT  
NOAH O'CONNOR, IT

(Computer-aided transcription of stenotype notes)

Reported by:

Ronda J. Thomas, RMR, CRR

INDEXSeptember 20, 2024PLAINTIFF'S WITNESSES:PAGE:

Colonel Dakota Wood	
Cross by Mr. Carmichael	3
Captain Jason Birch	
Direct by Mr. Mendez	19
Cross by Mr. Mortara	40
Captain Steven Vahsen	
Direct by Mr. Mortara	61
Cross by Mr. Mendez	89
Redirect by Mr. Mortara	103
Beth Bailey	
Direct by Ms. Gargeya	105
Cross by Ms. Wyrick	141
John Sherwood	
Direct by Mr. Mendez	150
Cross by Mr. Connolly	177

1 (10:12 a.m.)

2 **THE COURT:** Good morning, everyone. My apologies for  
3 starting a few minutes late. I got tied up with something and  
4 it threw my schedule off a bit, and I apologize to all of you.

5 And with that, if we can reswear the witness.

6 Colonel Wood, you'll be resworn, please.

7 **THE CLERK:** Good morning, sir.

8 (Witness sworn.)

9 **THE CLERK:** Thank you. You can have a seat. If you  
10 don't mind please stating your first and last name. Please  
11 spell them both. Thank you.

12 **THE WITNESS:** Dakota Wood; D-A-K-O-T-A, W-O-O-D.

13 **THE COURT:** Mr. Carmichael, you may proceed.  
14 Good morning.

15 **MR. CARMICHAEL:** Good morning, Your Honor.

16 **CROSS EXAMINATION**

17 **BY MR. CARMICHAEL:**

18 **Q.** Good morning, Mr. Wood. I just want to confirm that you  
19 want to go by Mr. Wood today and not Colonel Wood?

20 **A.** I have no preference.

21 **Q.** No preference? Okay.

22 **THE COURT:** Actually, I do have a preference. I will  
23 tell you that anyone who's served in the military has a rank.  
24 My view is, they hold that rank, and I respect it. So  
25 General Walker is General Walker because he's been in the

1 private sector, and Colonel Wood is Colonel Wood, and I would  
2 prefer that unless Colonel Wood objects.

3 **THE WITNESS:** Thank you, Your Honor.

4 **THE COURT:** That's quite all right.

5 **BY MR. CARMICHAEL:**

6 **Q.** Colonel Wood, yesterday you offered the opinion that  
7 lowering standards can impact unit cohesion, correct?

8 **A.** Yes.

9 **Q.** Okay. But you're not familiar with the specifics of the  
10 Naval Academy admissions process, correct?

11 **A.** I am not deeply familiar, no.

12 **Q.** You would agree that a service academy may want to look at  
13 actors other than grades and test scores when deciding to admit  
14 a person, correct?

15 **A.** Yes. It can adopt whatever procedure it wants.

16 **Q.** Yesterday you testified that an aggressive attitude is a  
17 positive quality for military service, correct?

18 **A.** I agree, yes.

19 **Q.** So would you agree that varsity sports should be a  
20 positive factor for admissions to a service academy?

21 **A.** Yes.

22 **Q.** Yesterday you testified that going above and beyond your  
23 own work and trying to help others is a positive quality for  
24 military service, correct?

25 **A.** I did.

1 Q. So you would agree that community service and a dedication  
2 to helping others should be a positive factor for admissions to  
3 a service academy?

4 A. Yes.

5 Q. Yesterday you testified that adopting the military as a  
6 profession and being service oriented is a positive quality for  
7 military service, correct?

8 A. Correct.

9 Q. So you would agree with that motivation to serve should be  
10 a positive factor for admission to a service academy, correct?

11 A. Correct.

12 Q. And you've seen this play out in real life with your  
13 friend Colonel Andy Solgere?

14 A. Yes.

15 Q. Am I saying that right?

16 A. Solgere.

17 Q. As a young man, Colonel Solgere demonstrated an absolute  
18 passion to be a Marine Corps officer through his essays and  
19 recommendations, correct?

20 A. Right.

21 Q. But his academic skills were not on the level to go right  
22 from high school and to the Naval Academy, correct?

23 A. Yes.

24 Q. He was admitted to NAPS and then the Academy and went to  
25 have a full Marine Corps career and retire as a colonel,

1 correct?

2 A. That's correct.

3 Q. You're not currently in the Marine Corps, correct?

4 A. That is correct.

5 Q. And you do not speak on behalf of the Marine Corps,  
6 correct?

7 A. Correct.

8 Q. And you do not speak on behalf of the Navy, correct?

9 A. That's correct.

10 Q. Nor do you speak on behalf of the Department of Defense,  
11 correct?

12 A. Correct.

13 Q. The views you express here are your own views, correct?

14 A. They are.

15 Q. And those views are based on reviewing your own career and  
16 then sharing insights derived from your career, correct?

17 A. Yes.

18 Q. And your opinion is that the racial and ethnic diversity  
19 of the force is irrelevant to its combat effectiveness,  
20 correct?

21 A. Correct.

22 Q. And your opinion is that diversity is irrelevant to  
23 whether a military unit is more cohesive and collaborative,  
24 correct?

25 A. Correct.

1 Q. And your opinion is the racial and ethnic diversity of the  
2 Officer Corps is irrelevant to the risk assigned to a military  
3 unit, correct?

4 A. Correct.

5 Q. And more specifically, you believe the racial and ethnic  
6 diversity of the Officer Corps is irrelevant to the risks  
7 assigned to a ship, right?

8 A. Yes.

9 Q. And you believe that the racial makeup of a Navy ship is  
10 entirely irrelevant to the military efficiency and  
11 effectiveness of the ship, correct?

12 A. Correct.

13 Q. And you believe the racial diversity of the leadership of  
14 a ship is irrelevant to whether the ship is better equipped to  
15 meet its challenges, correct?

16 A. I do, yes.

17 Q. In fact, you believe that a ship could have entirely White  
18 leadership and entirely Black enlisted, and it would not  
19 matter, correct?

20 A. That's correct. Provided the leadership is good.

21 MR. CARMICHAEL: Noah, could we pull up DX20, please.

22 BY MR. CARMICHAEL:

23 Q. Colonel Wood, this is a directive from the former  
24 commandant of the Marine Corps, General James Amos. Are you  
25 familiar with him?

1 A. I am.

2 Q. Although the directive does not have a date on it, the  
3 2-13 marking just under the DoD seal means the directive was  
4 issued in 2013, correct?

5 A. That would make sense, yes.

6 Q. That would make sense with when Colonel Amos was the  
7 commandant of the Marine Corps?

8 A. No, the numbering system, I would interpret that as being  
9 February of 2013 or the second letter issued in that year.

10 Q. So eight years after you left Marine Corps active duty,  
11 correct?

12 A. Yes.

13 Q. In this directive, General Amos establishes the  
14 Commandant's Diversity Task Force Initiative, correct?

15 A. Yes, that's what it says.

16 Q. And in Paragraph 2, it says, "I've concluded it is one  
17 that reflects our reputation for performance and leadership.  
18 As such, I've established four task force groups; race,  
19 ethnicity: attract, develop, and retain minority officers;  
20 leadership, accountability, and mentoring; three, woman in the  
21 corps: attract, develop, and retain women officers; and four:  
22 culture and leading change."

23 Do you see that?

24 A. I do.

25 **MR. CARMICHAEL:** I want to skip to Paragraph 6, which



1 is on the next page.

2 **BY MR. CARMICHAEL:**

3 **Q.** There, General Amos states, as one of the bases for  
4 creating this task force, "Aspects of diversity, such as race,  
5 ethnicity, and gender do impact how we experience life, and I'm  
6 convinced, may influence how each of us evaluates our personal  
7 Marine Corps journey."

8 Do you see that?

9 **A.** I do.

10 **Q.** I take it you disagree with that statement from  
11 General Amos?

12 **A.** I do not disagree with it, no.

13 **Q.** So you do agree that race, ethnicity, and gender do impact  
14 how we experience life and may influence how each of us  
15 evaluates our personal Marine Corps journey?

16 **A.** I agree that every characteristic that every individual  
17 has, be it economic circumstance, their culture that they grow  
18 up, in the race, ethnicity, all of those form the person that  
19 we grow up to be.

20 **MR. CARMICHAEL:** Okay. We can pull that down.

21 **BY MR. CARMICHAEL:**

22 **Q.** But in your view, racial tension is not a concern for the  
23 modern military, correct?

24 **A.** That's correct.

25 **Q.** And in your view, gender tension is not a concern for the

1 modern military, except where you believe the system is rigged  
2 in a woman's favor, correct?

3 A. Could you repeat that.

4 Q. Yeah. In your view, gender tension is not a concern for  
5 the modern military, except where you believe the system is  
6 rigged in a woman's favor, correct?

7 A. Well, those two aren't really connected. I mean, a system  
8 being rigged in a woman's favor is not necessarily gender  
9 tension. So I'm not sure the relationship.

10 Q. Okay. Do you remember we met prior and it was at your  
11 deposition --

12 A. Yes.

13 Q. -- and you were sworn under oath during the deposition?

14 A. I do, yep.

15 MR. CARMICHAEL: So I want to pull up the deposition  
16 transcript at 289, 2 through 10.

17 BY MR. CARMICHAEL:

18 Q. There, I asked you:

19 "Q. Do you think that gender tension is still a concern  
20 in the military?"

21 And you said:

22 "A. Tensions are not a concern, but there are examples  
23 where people think that the system is rigged to achieve  
24 outcomes that aren't supported by actual capabilities."

25 A. And I stick with that statement.

1 Q. I'm sorry, what did you say?

2 A. Yes, I see it.

3 MR. CARMICHAEL: We can pull that down now.

4 BY MR. CARMICHAEL:

5 Q. And you think sexism is not a concern in the modern  
6 military, except when it is sexism directed at men, correct?

7 A. I don't understand that question at all.

8 Q. I could ask it again.

9 You think sexism is not a concern in the modern military,  
10 except when it is sexism directed at men, correct?

11 A. I genuinely don't really understand where you're going  
12 with that.

13 So to me, sexism is when you are holding an individual's  
14 gender or sex against them in some way or treating them  
15 differently, right. So I would guess that a woman can have  
16 sexist attitudes toward a man, and a man can have sexist  
17 attitudes towards a woman. In either case, that's bad.

18 In terms of sexism being a problem in the military, it is  
19 not widespread. But we're all humans, and you'll find  
20 individual instances where there are problematic behavior, and  
21 good leaders will stamp that out immediately and not tolerate  
22 that.

23 MR. CARMICHAEL: Can we pull up the deposition  
24 transcript at 292, 3 through 17.

25 A. My screen just went blank.

1           **THE COURT:** Hold on one second, Mr. Carmichael.

2           The screens have gone blank here. There we go. Thank  
3 you, Ms. Herndon.

4 **BY MR. CARMICHAEL:**

5 **Q.** There, I asked:

6           **"Q.** Do you think sexism is still a concern in the  
7 military?"

8           And then you said:

9           **"A.** Sexism, if we define that is -- define that as this  
10 woman is not only in this position because the system is  
11 manipulated to get her into that position.

12           **"Q.** But otherwise not, that's not a concern?"

13           You said:

14           **"A.** No."

15           Is it your opinion that a gender-integrated ship operates  
16 no more effectively than an all-male ship?

17 **A.** There is no difference between the two, yes.

18 **Q.** In fact, you believe that a mixed-gender ship may present  
19 challenges not present on a male-only ship due to pregnancy and  
20 relationships between men and women; is that correct?

21 **A.** I do agree with that.

22 **Q.** Your opinion is that racism and sexism is not a concern in  
23 the military, except when sexism is directed at men, are based  
24 on your perceptions and discussions you've had with some of  
25 your colleagues over the years; is that correct?

1 A. I don't agree with the full characterization in that  
2 statement. You keep focusing on this "directed at men," and it  
3 can be either way, as I've described. So when we'd use a  
4 specific example to illustrate a point, that example is not  
5 held in isolation as being representative of the entire  
6 discussion.

7 Q. But these are based off of your own perceptions and  
8 discussions with colleagues over the years?

9 A. I believe that sexism and racism is not systemic in the  
10 military. When there are occurrences, again, good leadership  
11 stamps that out.

12 Q. Yesterday you discussed the Marine Corps boot camp  
13 experience; is that right?

14 A. That's right.

15 Q. You mentioned ditching civilian clothes, correct?

16 A. Correct.

17 Q. And marching together, correct?

18 A. Yes.

19 Q. And sleeping in open barracks, spaces, correct?

20 A. Yes.

21 Q. And everyone shaving their head, correct?

22 A. Yes.

23 Q. But women attend Marine Corps boot camp as well, right?

24 A. They do.

25 Q. And women don't shave their heads at Marine Corps boot

1 camp.

2 A. They have to adopt an approved hairstyle that has certain  
3 parameters to it; how long it is, how it's maintained. So  
4 there are standards that are applied to women that are relevant  
5 to a woman's hairstyle as opposed to women going bald.

6 Q. Okay. You're a 1985 graduate from the Naval Academy; is  
7 that correct?

8 A. 1985.

9 Q. Okay. Yeah. I'm 2001.

10 So you retired from the Marine Corps as a lieutenant  
11 colonel in 2005, correct?

12 A. That's correct.

13 Q. So just under 20 years ago, right?

14 A. Yes.

15 Q. And from 2014 until 2024, you worked for The Heritage  
16 Foundation, correct?

17 A. That is correct.

18 Q. The Heritage Foundation is a conservative public policy  
19 institute, correct?

20 A. Yes.

21 Q. Now you're self-employed; is that right?

22 A. I am.

23 Q. In the Marine Corps, you were a motor transport officer;  
24 is that correct?

25 A. I started as motor transport and then converted to an

0402, which is a logistics officer, which encompasses all of the things to include motor transport but supplying and engineering and a lot of other skill sets.

Q. You last served on a ship from the fall of 1996 to the spring or late winter of 1997; is that correct?

A. That's correct.

Q. And that was when you deployed to the Mediterranean as part of the Marine contingency on the USS Wasp; is that right?

A. Yes.

Q. That was a little over 27 years ago, correct?

A. Yes.

Q. And 27 years ago, the Marine Corps contingent would not have been gender integrated; is that right?

A. There were women in the Marine Corps. Combat positions were not open to women at that time.

Q. But on your MEU --

A. We had women aboard my MEU.

Q. Except when you did a midshipmen cruise for a few weeks in 1981 and 1983, you've never been part of a ship's crew, correct?

A. That is correct.

Q. So when you last served on a ship, there were no smartphones, right?

A. That is truly correct.

Q. No texting even, right?

1 A. We -- not by handheld devices, but there were ways to  
2 communicate via computer; emails and those sorts of things.

3 Q. I assume since the first text phone was invented by Nokia  
4 in 1997, you didn't have texting -- text phones?

5 A. That's correct.

6 Q. No social media; is that right?

7 A. None.

8 Q. And you mentioned Internet. That was limited to just  
9 emails. Couldn't surf the web, right?

10 A. Well, there was very little web to surf. But yeah, your  
11 abilities aboard ship were quite limited because of the pipe or  
12 the means for communication to pass information in large  
13 quantities, so most of it was just data. But you weren't  
14 necessarily surfing the web, and certainly not while underway.  
15 When you pulled into a port, you would be able to do that.

16 Q. Would it surprise you to learn that the commanding  
17 officers of eight of the 12 aircraft carriers in the United  
18 States Navy are commanded by USNA graduates from either 1996 or  
19 1997?

20 A. Not surprised. It's an interesting figure.

21 Q. So those individuals have had an entire naval career,  
22 going from ensign to commanding the capital ships of the U.S.  
23 fleet since you last served on a ship.

24 A. Okay.

25 **MR. CARMICHAEL:** All right. I have nothing further.



1           **THE COURT:** Thank you, Mr. Carmichael.

2           Mr. Connolly, any redirect?

3           **MR. CONNOLLY:** Nothing further.

4           **THE COURT:** All right. Thank you very much.

5           Colonel Woods, you may step down. Sir, you should not  
6 discuss your testimony with anyone in the event you will  
7 perhaps be called back to the witness stand until this trial  
8 concludes at the end of next week. So thank you very much.

9           All right. With that, Mr. Mortara, welcome back. I know  
10 you were away for one witness yesterday afternoon. You're back  
11 in the saddle here.

12          You're calling the next witness?

13          **MR. MORTARA:** Your Honor, because of witness  
14 availability, the defense will call the next witness. I  
15 believe Mr. Mendez will do so.

16          **THE COURT:** Okay. That's fine.

17          Mr. Mendez, you're calling the next witness; is that  
18 right?

19          **MR. MORTARA:** We have some confusion. One moment.

20          **THE COURT:** That's all right. Take your time.

21          As I understand it, the next witness is, at least  
22 according to my law clerks, the next witnesses after  
23 Colonel Wood have been listed as either Captain Jason Birch or  
24 Steve Vahsen, one or the other. Then defendant's experts  
25 Beth Bailey and John Sherwood, they're the ones you have lined

1 up next, to my knowledge. Is that correct?

2 **MR. MORTARA:** That's correct, Your Honor. We're  
3 moving so much faster than we expected. I expected  
4 Captain Birch to be called. Now they're going to call  
5 Captain Birch. We're all good.

6 **THE COURT:** Okay. That's good. Fine.

7 Mr. Mendez, good morning to you. And we'll call  
8 Captain Birch to the witness stand.

9 Just so the record is clear, we've agreed that these  
10 witnesses can be taken out of turn at various intervals by the  
11 plaintiff and the defendant. And Captain Birch was listed as  
12 an expert witness by the defense and they may call witnesses by  
13 the plaintiff.

14 So Captain Birch will come forward.

15 **MR. GARDNER:** Your Honor, for clarity, Captain Birch  
16 is a fact witness. He's not an expert.

17 **THE COURT:** All right. I'm sorry. He's a fact  
18 witness. All right.

19 Captain Birch, good morning to you, sir. If you'll come  
20 forward here and be sworn.

21 **THE WITNESS:** Good morning, sir.

22 **THE CLERK:** Before you're seated, if you don't mind  
23 raising your right hand for me, please.

24 (Witness sworn.)

25 **THE CLERK:** Please state and spell your first and last

1 name for the record.

2 **THE WITNESS:** Jason Birch; J-A-S-O-N, B-I-R-C-H.

3 **THE CLERK:** Thank you.

4 **THE COURT:** You may proceed, Mr. Mendez.

5 **MR. MENDEZ:** Thank you, Your Honor.

6 **DIRECT EXAMINATION**

7 **BY MR. MENDEZ:**

8 **Q.** Good morning, Captain Birch.

9 **A.** Good morning.

10 **Q.** Can you please state your full name for the record.

11 **A.** Jason Birch.

12 **Q.** Where did you attend college?

13 **A.** I went to the U.S. Naval Academy.

14 **THE COURT:** Captain Birch, swing that microphone just  
15 a little bit closer to you. You don't have to lean in much,  
16 just make sure to pick your voice up. Thank you.

17 **BY MR. MENDEZ:**

18 **Q.** And why were you interested in attending the Naval  
19 Academy?

20 **A.** I grew up just outside Annapolis, and one of my mentors --  
21 father figure, really -- was a class of '58 graduate, and so I  
22 had some exposure to the midshipmen, and was drawn to service.

23 **Q.** What were your high school grades when you first applied  
24 for the Naval Academy?

25 **A.** As I recall, somewhere around probably around a 3.5 or so.

1 Q. And what were your test scores when you applied to the  
2 Naval Academy?

3 THE COURT: Just for the record, in terms of for the  
4 public, a grade point average of 3.5 is based on a 4.0 system,  
5 correct, Captain Birch?

6 THE WITNESS: Yes, sir.

7 THE COURT: Just so we clarify that for --

8 MR. MENDEZ: Thank you, Your Honor.

9 THE COURT: -- the public dissemination in terms of  
10 3.5 average, what it means.

11 MR. MENDEZ: Absolutely.

12 BY MR. MENDEZ:

13 Q. What were your test scores when you applied to the Naval  
14 Academy?

15 A. In terms of SATs, I recall somewhere probably around 1130  
16 or so.

17 Q. Did you get accepted when you applied initially to the  
18 Naval Academy?

19 A. I was initially accepted to the Naval Academy Preparatory  
20 School.

21 Q. And did you attend the Naval Academy Preparatory School?

22 A. Yes, I did.

23 Q. What year did you graduate?

24 A. I graduated in 1995.

25 Q. What did you do after you graduated from NAPS?

1 A. After graduating from NAPS, I went on to the Naval  
2 Academy.

3 Q. Did you graduate from the Naval Academy?

4 A. Yes, I did.

5 Q. What year did you graduate from the Naval Academy?

6 A. I graduated in 1999.

7 Q. What degree did you learn from the Naval Academy?

8 A. I earned a degree in general science.

9 Q. And how were your grades in the Naval Academy?

10 A. I had somewhere around probably a 2.5 or so.

11 Q. Is that from the 4.0 scale?

12 A. Correct.

13 Q. And Captain Birch, do you know what the Overall Order of  
14 Merit is?

15 A. Yes, I do.

16 Q. Could you please explain what that is for the record.

17 A. Sure. It's a combination of your academic performance  
18 combined with your performance as a midshipman, as an officer  
19 candidate, and certainly your physical scores as well.

20 Q. Where did you rank in terms of Overall Order of Merit  
21 during your time at the Naval Academy?

22 A. Overall, I was definitely in the top half.

23 Q. Do you know what the Academic Order of Merit is?

24 A. I do.

25 Q. Could you explain what that is for the record.

1 A. Yes. That is your performance in the classroom; that's  
2 your coursework both within your major and core courses outside  
3 of your major.

4 Q. And where did you rank in terms of the Academic Order of  
5 Merit during your time at the Naval Academy?

6 A. My Academic Order of Merit, I was probably 50 percent or  
7 below that.

8 Q. Do you know what the Military Order of Merit is?

9 A. I do.

10 Q. Could you explain what that is for the record.

11 A. Yes. That's your -- a combination of your military scores  
12 from your military courses, your performance as a midshipman as  
13 well as your physical performance and fitness.

14 Q. Where did you rank in terms of the Military Order of Merit  
15 during your time at the Naval Academy?

16 A. I would have been likely in the top 25 percent, as I  
17 recall.

18 Q. And what communities did you select for your first  
19 assignment following graduation from the Naval Academy?

20 A. I selected to become a SEAL, a Naval Special Warfare  
21 officer.

22 Q. Why did you apply to become a SEAL?

23 A. I was always drawn to their sense of teamwork, and I  
24 definitely wanted a challenge in my career, and so that was a  
25 community that I was drawn to.

1 Q. Are you currently a member of the Navy?

2 A. Yes, I am.

3 Q. When did you join the Navy?

4 A. So I -- when I began at the Naval Academy Preparatory  
5 School, in NAPS.

6 Q. Are you currently in active duty service?

7 A. Yes, I am.

8 Q. What is your rank?

9 A. I'm a captain.

10 Q. And I see that you're wearing insignia on the top of your  
11 uniform on the left-hand sign that is gold colored. Could you  
12 explain what that insignia represents for the record.

13 A. Yes. It's what we call our Trident. And so officers and  
14 enlisted personnel that have qualified to become a Navy SEAL  
15 are authorized to wear this pin.

16 Q. And below that, I see you're wearing various ribbons.  
17 Could you explain what some of those ribbons represent for the  
18 record.

19 A. Sure. Some of these ribbons represent different medals,  
20 commendations, and recognition in combat. So it would be like  
21 a bronze star, a combat action ribbon, presidential unit  
22 citations, and different sea service appointment ribbons as  
23 well.

24 Q. When were you commissioned as an officer?

25 A. In May of 1999, May 26.

1 Q. Were you commissioned into the war-fighting community?

2 A. Yes, I was.

3 Q. What was your first assignment with the SEAL team?

4 A. I was assigned to SEAL Team 2.

5 Q. From approximately what years?

6 A. From about 2000 to 2006.

7 Q. And briefly, could you explain for the record what the  
8 significance of the different SEAL team numbers means?

9 A. Sure. Generally, our East Coast-based SEAL teams are the  
10 even-numbered teams, and our odd-numbered teams are  
11 headquartered out of the West Coast.

12 Q. What did you do as a member of SEAL Team 2?

13 A. As SEAL Team 2, I had various positions, initially moving  
14 up from 3rd officer to eventually becoming an assistant platoon  
15 commander, and then, finally, a platoon commander during my  
16 time at SEAL Team 2.

17 Q. What did you do after your assignment with SEAL Team 2?

18 A. After SEAL Team 2, I was assigned to Naval Special Warfare  
19 Unit 3 in Bahrain.

20 Q. What did you do afterwards?

21 A. After my assignment in Bahrain, I came back stateside, and  
22 I was a troop commander at SEAL Team 4.

23 Q. What did you do as the troop commander of SEAL Team 4?

24 A. As troop commander, I had numerous platoons working for  
25 me, and we trained up over several years to deploy.



1 Q. How many platoons did you lead?

2 A. Four to five platoons from both East and West Coast.

3 Q. How many SEALs were in each platoon that you led?

4 A. So each platoon has about 16 to 20 operators in it.

5 Q. What did you do after your assignment with SEAL Team 4?

6 A. After that assignment and deployment, I was assigned to  
7 Special Operations Command Pacific in Hawaii, or SOCPAC.

8 Q. Where were you based out of during your assignment with  
9 Special Operations Command Pacific?

10 A. So for about half the time, I was at headquarters right  
11 there in Hawaii. And for the other half of that assignment, I  
12 was stationed over in our U.S. Embassy in Bangladesh.

13 Q. What did you do afterwards?

14 A. After that assignment, I came back to the mainland and was  
15 assigned as both the operations officer and executive officer  
16 of SEAL Team 8.

17 Q. What does an operations officer do?

18 A. So an operations officer is in charge of the day-to-day  
19 functioning, training, and readiness of a SEAL team.

20 Q. And you mentioned that you're also executive officer. Can  
21 you explain what an executive officer does.

22 A. Yeah. So the executive officer, the XO, is essentially  
23 the deputy commanding officer, second-in-command of the team,  
24 and in charge of, again, readiness and the workup and training  
25 cycle.

1 Q. What did you do after your assignment with SEAL Team 8?

2 A. After SEAL Team 8, I was assigned to the Pentagon as the  
3 flag aide or aide-de-camp to the vice chief of naval  
4 operations.

5 Q. What did you do as the flag aide?

6 A. So as a flag aide, I was in charge of his day-to-day  
7 schedule, movement both in and around the Pentagon as well as  
8 his communications and travel coordination to fleet  
9 concentration areas both in the Continental United States as  
10 well as overseas.

11 Q. And what did you do after this?

12 A. After my assignment as the aide, I went to get a master's  
13 degree at Johns Hopkins School of Advanced International  
14 Studies.

15 Q. What did you do after you graduated from Johns Hopkins?

16 A. After finishing up at SAIS, I was assigned to Naval  
17 Special Warfare Group 4, where I served as the operations  
18 officer, chief staff officer. And also, I commanded the  
19 Central Commands Crisis Response element for a time period as  
20 well.

21 Q. What did you do after your assignment with Special Warfare  
22 Group 4?

23 A. After my assignment at Group 4, I was in command of SEAL  
24 Team 10.

25 Q. What did you do as the commanding officer of SEAL Team 10?

1 A. Well, I was responsible and accountable for all of the  
2 SEALs and everyone assigned to my command and eventually  
3 working up to deploy in support of national objectives.

4 Q. What did you do after your time with SEAL Team 10?

5 A. After that assignment, I moved to Florida. I was assigned  
6 to the U.S. Special Operations Command Headquarters at our  
7 joint base in MacDill.

8 Q. What did you do next?

9 A. That would bring me up to my current assignment as the  
10 3rd Battalion officer at the U.S. Naval Academy.

11 Q. What do you do as the 3rd Battalion officer at the Naval  
12 Academy?

13 A. As a BATTO, as we call it, I am the senior mentor to  
14 approximately 750 officer candidates, both Navy and Marine  
15 Corps, or midshipmen, as we call them.

16 Q. Have you been deployed before?

17 A. Yes, I have.

18 Q. How many times have you been deployed?

19 A. At least seven times.

20 Q. In what regions have you been deployed?

21 A. I've deployed to the Middle East, South America,  
22 South Asia, Southeast Asia, and Europe as well.

23 Q. Do you have --

24 A. Africa.

25 Q. Do you have combat experience?

1 A. I do.

2 Q. For which assignments did you experience combat?

3 A. Primarily during my assignments at SEAL Teams 2, 4, and  
4 10.

5 Q. In what countries did you see combat?

6 A. Primarily in Iraq and Somalia.

7 Q. And I want to turn to some of your experience. And before  
8 doing so, based on your experience, how do you define mission  
9 success?

10 A. Well, mission success, I mean, you can think in terms  
11 of -- excuse me -- you know, you have, you know, tactical  
12 objectives, and so mission success could be anywhere from  
13 moving from point A to point B to hunting an individual,  
14 high-value individual or a terrorist or, you know, going after  
15 a person.

16 We think about strategic mission. A mission for us  
17 oftentimes is to develop relationships to build partner  
18 capacity with our different partners and allies around the  
19 world and to really set the stage for deployments to come after  
20 us, and so really engendering trust and upholding our  
21 reputation for both our U.S. deployed leadership as well as  
22 that with our foreign partners.

23 Q. I want to ask you about your time with SEAL Team 8.

24 During this assignment, were there instances in which your  
25 race was relevant to your work?

1 A. Yes.

2 Q. Could you describe an instance in which it was relevant to  
3 your work.

4 A. Sure. While I was assigned as a Ops NEX there, we had an  
5 incident of racism and harassment with one of our operators.

6 Q. Could you tell me what happened.

7 A. Yes. So we have what we call biography, or bio, we  
8 usually call it. And on deployment, this bio would have an  
9 operator's picture, basic -- you know, date of birth,  
10 biographical information, so hair color, eye color, education,  
11 hometown, all those kind of basic data information. And so his  
12 bio was altered to reflect some very nasty, racial stereotypes  
13 and other horrible things that go against our core values.

14 Q. Approximately what year did this incident occur?

15 A. During my tour there, so sometime between 2011, 2013.

16 Q. How many individuals were involved as perpetrators?

17 A. At least two, as I recall.

18 Q. How did you become aware of the incident?

19 A. Well, my commanding officer asked me to speak with --  
20 speak with him about the incident. But it was reported up to  
21 the chain of command, and then, you know, being in the position  
22 I was in, eventually made its way up to me.

23 Q. What edits were made to the special operator's biography?

24 THE COURT: Excuse me. One second, please.

25 Mr. Mendez, I don't believe you've indicated anywhere on

1 the record what the race of Captain Birch is.

2 **BY MR. MENDEZ:**

3 **Q.** Captain Birch, what is your race?

4 **A.** I am a Black man.

5 **MR. MENDEZ:** Thank you, Your Honor.

6 **BY MR. MENDEZ:**

7 **Q.** What edits, Captain Birch, were made to the Black  
8 operator's biography?

9 **A.** So some of the things that I recall, his hair, instead of  
10 being brown was, like -- was brill-like, nappy. His eye color,  
11 instead of brown, was doodoo brown. It made different  
12 caricatures and things about the size of his lips, what he ate,  
13 and other, again, very nasty, inappropriate things.

14 **Q.** How was your race relevant to this incident?

15 **A.** My skipper, my commanding officer, asked me to speak with  
16 him because he felt that I would connect with him, in a way.  
17 And so I did.

18 **Q.** Did you discuss the incident with the operator who was  
19 subject to this discriminatory behavior?

20 **A.** I did. I did. And my takeaway from those conversations  
21 was that he felt confident and comfortable in speaking with me  
22 about what happened and that he might not have even brought it  
23 up, knowing that if I wasn't in a position that I was in, a  
24 position of leadership, that that incident wouldn't have been  
25 handled swiftly and promptly.

1 Q. Was there an investigation into this incident?

2 A. There was an investigation.

3 Q. Were you involved in the investigation to the incident?

4 A. Well, I wasn't the lead investigator, but as Ops NEX, I  
5 was certainly aware of the investigation as it went through the  
6 process.

7 Q. What was the outcome of the investigation?

8 A. So as I recall, the individuals, the perpetrators, went to  
9 what we call nonjudicial punishment, or captain's mast, and  
10 were levied sanctions.

11 Q. Could you explain for the record what captain's mast is?

12 A. It's when you break the Uniform Code of Military Justice,  
13 and so it's military punishment.

14 Q. What impact did this incident have on SEAL Team 8?

15 A. It was -- it was very disruptive. It was very  
16 destructive. It tore at the trust that we had on that team,  
17 amongst our teammates. It brought down morale. And we had to  
18 make some reassignments. We had to take some individuals  
19 offline while we investigated those, you know, at the time,  
20 allegations.

21 Q. What does it mean to take someone offline from a SEAL  
22 team?

23 A. So when you take someone offline, it means if they were in  
24 a leadership position, they're moved to some other position  
25 with different responsibilities or not the same

1 responsibilities or no responsibilities at all. Sometimes it  
2 can mean having that individual actually fly back to  
3 headquarters, if you will, so physically removing them from an  
4 environment as well.

5 Q. Did this incident affect any scheduled deployments for  
6 SEAL Team 8?

7 A. So as I recall, we were on deployment. The team was  
8 deployed at the time. And so those -- that affected those  
9 missions during that time period.

10 Q. I want to turn to your time at SEAL Team 10.

11 During this assignment, were there instances in which your  
12 race was relevant to your work?

13 A. I believe so.

14 Q. Could you provide an example.

15 A. Yes. So when I was in command SEAL Team 10, I -- towards  
16 the end of our workup, that time in command, I was the task  
17 force commander of a special task force deployed to Somalia.  
18 And so being the first Black officer to command a SEAL team and  
19 certainly the first task force commander in that -- in that  
20 environment, definitely was significant in terms of where I was  
21 deploying with our Somali partners and our other East African  
22 partners.

23 Q. How did your background as a Black commanding officer  
24 impact your experience in Somalia with SEAL Team 10?

25 A. Well, my takeaway from the interactions with their senior



1 military leaders and civilian leaders was that it was  
2 significant. They called me "Brother." It -- my background,  
3 my race sparked different conversations, interest in how I  
4 gained the position that I did. And everything that came from  
5 there really was built upon some of those very positive  
6 interactions.

7 It helped to dissuade some of the natural apprehension  
8 that many of our foreign partners have when they work with the  
9 U.S. military in general as well.

10 Q. And what informs your view that your racial background  
11 helped foster the connections that you just described?

12 A. Right. So again, we worked very closely for that time  
13 period. Really, on a daily, weekly basis, they told me so.

14 Q. I want to ask you about your time as the flag aide to the  
15 vice chief of naval operations.

16 I guess, to get started, what does the vice chief of naval  
17 operations do?

18 A. The vice chief is essentially the executive officer of our  
19 entire Navy. And so he's overall responsible for the  
20 readiness, training, and in many ways, the morale of our Navy  
21 as well.

22 Q. Were there instances during this assignment where your  
23 race was relevant to your work?

24 A. I believe so.

25 Q. Could you provide an example.

1 A. Yes. So as the XO of the Navy, oftentimes we had to make  
2 international visits, meeting with his counterparts in  
3 different countries. And I can think of our state visit, if  
4 you will, to China as a significant event where I believe my  
5 race was relevant.

6 He specifically chose the traveling team to include  
7 myself. It was a very diverse team that include different  
8 warfare communities within the Navy, so intelligence officers,  
9 supply professionals, et cetera, different -- different races,  
10 different genders. And so we were able to take part in and be  
11 in the room for many of those strategic discussions as he met  
12 with different military and civilian leaders.

13 Q. Do you believe that your background as a Black officer was  
14 important during this visit in China?

15 A. I do.

16 Q. And why do you believe so?

17 A. Well, I believe for a visit like this, with the context  
18 that a country like China and others don't have the same core  
19 values that we have, they certainly don't have the same human  
20 rights practices and adherence that we have and that we hold  
21 dear in America. And really, just our team can visually see  
22 that in America, what we put on display for the world really,  
23 or at least there in China, is that if you achieve -- develop  
24 and achieve a level of expertise in leadership, that regardless  
25 of your background, regardless of what you look like, you'll be

1 put in a position of command and responsibility.

2 **Q.** I want to turn to your time working Embassy in Bangladesh  
3 while you were assigned to Special Operations Command Pacific.

4 Could you describe for the record what you did during this  
5 assignment.

6 **A.** Yes. So during that assignment, I was the Pacific command  
7 augmentation team leader. And so some of our duties were to  
8 build partner capacity, develop relationships so that we could  
9 have more training with some members of the Bengali military.  
10 Specifically also to help identify and gain access and  
11 placement in terms of, again, identifying opportunities to gain  
12 access to clean water, some different infrastructure projects.

13 And also, to be a good member of the country team. A  
14 country team, as they call it, is comprised of different  
15 members of the Department of State, USAID, or the Agency for  
16 International Development and, of course, all of the local  
17 nationals there in Bangladesh, to include all of the different  
18 missions from countries that are located in the capitol city.

19 So during that assignment, I definitely believe that my  
20 background and my race was powerful to, again, put on display  
21 for everyone that was exposed to our values, both in the Navy  
22 and our American values.

23 **Q.** Now let's turn to your current role as 3rd Battalion  
24 officer at the Naval Academy.

25 In your role as 3rd Battalion officer, do you serve as a

1 mentor to Naval Academy midshipmen?

2 A. Yes, I do.

3 Q. Approximately how many?

4 A. Approximately 750 midshipmen.

5 Q. For which class years?

6 A. So comprising all class years, from freshman to seniors.

7 Q. Do you believe that your race is relevant to serving as an  
8 effective mentor?

9 A. I believe that it is.

10 Q. How often do you typically interact with your mentees?

11 A. I interact with them on a daily basis.

12 Q. And what is your takeaway on the importance of racial  
13 diversity in the Officer Corps from your interactions with your  
14 mentees?

15 A. From those interactions, it's extremely important.

16 Q. How so?

17 A. You know, my takeaway from these conversations I have  
18 them, these sessions that I have with them are that my visible  
19 presence and my opportunity to lead them kind of provides them  
20 a pathway, kind of a marker for what they can achieve in their  
21 life, you know, certainly whether it be in the Navy SEAL  
22 community or any warfare community within our Navy.

23 Q. During your career in the Navy, has anyone in the military  
24 exhibited racially discriminatory behavior directed towards  
25 you?

1 A. Yes.

2 Q. Approximately how many times have you been subject to  
3 racially discriminatory behavior?

4 A. I couldn't give you an exact number, but it's definitely  
5 happened on every tour that I've undertaken in the Navy.

6 Q. Can you provide some examples?

7 A. Sure. I can recall, early on in training at BUD/S,  
8 finishing either a run or an obstacle course, something I can't  
9 quite recall, but a captain took me and another trainee aside  
10 and say, "Hey, how are my two little cookies doing?" That's  
11 one example.

12 Probably a little bit on, towards the middle point of my  
13 career, my senior SEAL leader during that tour, flat out told  
14 me, he said, "Hey, look, I'm a racist bastard. I'll support  
15 you, but I'm a racist bastard." So he made that pretty clear.

16 Q. Have you written about these statements that you just  
17 described?

18 A. I have.

19 Q. Why did you write about those derogatory statements?

20 A. I wrote them in 2020, as I recall. It was on the heels of  
21 COVID, but also on the heels of the George Floyd death. And  
22 there were a lot of people talking, and I felt that my  
23 experience would be helpful or at least meaningful and resonate  
24 with whoever chose to read that article.

25 Q. And what effect did those statements have on you?

1 A. It certainly made me question my choice, you know, if I  
2 made the right choice in becoming a Navy SEAL and being part of  
3 the Naval Special Warfare community. It made me reflect if I  
4 wanted to remain on active duty and remain a part of the  
5 community as well. And it was harmful. It was distracting and  
6 hurtful.

7 Q. When is the most recent time that you have dealt with a  
8 situation in which someone was being subject to racially  
9 discriminatory behavior in the military?

10 A. Most recently, in my current tour as battalion officer at  
11 the Naval Academy.

12 Q. What happened?

13 A. So we had, within my battalion, two -- two young men who  
14 racially and sexually harassed another midshipman of Native  
15 American descent.

16 Q. How did you learn of the incident?

17 A. Again, being part of the chain of command, it -- again,  
18 the perpetrators were in my battalion, and so I found out  
19 through those channels.

20 Q. What effect did this incident have on you?

21 A. It was -- it was a reminder of the importance that being  
22 present and being someone that's approachable can have an  
23 individual so that they can come forward. And really, that  
24 adhering to our core values can have a lasting impact on  
25 someone's career, whether they choose to stay in the service or

1 to move on to other -- explore other opportunities if they  
2 don't feel like they're fully embraced by the team.

3 Q. Is the midshipman who was the victim in that incident, is  
4 she still at the Naval Academy?

5 A. No, she's not.

6 Q. Why not?

7 A. She resigned her appointment most certainly because of, as  
8 a contributor, this incident.

9 Q. Are the two perpetrators still at the Naval Academy?

10 A. So one is in the process of being fully separated, and one  
11 was retained, as I recall.

12 Q. Was the midshipman who was retained, was he punished?

13 A. Yes.

14 Q. And could you provide more detail on exactly what happened  
15 during this incident.

16 A. Yes. So they made and recorded comments to the effect  
17 of -- they called her Pocahontas and that they were going to  
18 pretend they were John Smith and colonize her.

19 Q. In your experience, Captain Birch, is racial diversity in  
20 the Officer Corps important for unit cohesion?

21 A. Absolutely.

22 Q. In your experience, is racial diversity in Officer Corps  
23 important for mission effectiveness?

24 A. Yes.

25 Q. In your experience, is racial diversity in the

1 Officer Corps important for recruitment?

2 A. Yes.

3 Q. Is racial diversity important for retention?

4 A. Yes.

5 Q. Is racial diversity important for our partnerships with  
6 military allies on the ground?

7 A. Yes.

8 MR. MENDEZ: Thank you.

9 THE COURT: Thank you, Mr. Mendez.

10 Cross-examination, Mr. Mortara.

11 MR. MORTARA: May I proceed, Your Honor?

12 THE COURT: Yes. Certainly.

13 CROSS EXAMINATION

14 BY MR. MORTARA:

15 Q. Good morning, Captain Birch.

16 A. Good morning.

17 Q. We've not met before; have we?

18 A. No, we've not.

19 Q. It's a great pleasure to meet you. And on behalf of  
20 everyone here, and particularly myself, thank you for your  
21 service to this country.

22 A. Thank you for those words. I appreciate it.

23 Q. I should just add, it's not trite. We're saying it to  
24 everyone.

25 I was really looking forward to meeting you after reading



1 your deposition, but I did not take it, correct?

2 A. No, you did not take my deposition.

3 Q. I want to start with this alarming and really disturbing  
4 episode you just spoke about regarding the sexual harassment  
5 that occurred at the Naval Academy.

6 You handled that as part of the chain of command as a  
7 battalion officer; you said that, correct?

8 A. That's correct.

9 Q. Because the two perpetrators were in your battalion.

10 A. That's correct.

11 Q. Do you think a White battalion officer, your colleagues --  
12 presumably some of the other battalion officers are White,  
13 correct?

14 A. Others are White, yes.

15 Q. Do you think they would have done the same things you did?

16 A. I believe so. I believe they would have taken action.

17 Q. Shifting to something that's a little less serious and  
18 sobering, let's talk about your early life.

19 You mentioned a father figure of yours that attended the  
20 Naval Academy.

21 A. Yes.

22 Q. Did that father figure write you a letter when you applied  
23 to the Naval Academy, or to NAPS?

24 A. I can't recall if he wrote a letter, but as a mentor, and  
25 certainly as my track and cross-country coach, I'm fairly

1 certain that in the application process, he was contacted.

2 Q. You didn't run track at Naval Academy; did you?

3 A. So for a short time I did, junior varsity.

4 Q. Oh, great. Congratulations.

5 What event?

6 A. Mostly middle distance, so 800, that distance about, a  
7 mile.

8 Q. So I'm trying to elevate my voice a little bit and be  
9 happier after the -- frankly, the very distressing episode you  
10 discussed, so you hear it in my voice a little bit. Sir,  
11 that's all I'm trying to do. I want to talk about something  
12 happy.

13 You are the president of the U.S. Naval Academy class of  
14 1999, right?

15 A. Yes, I am.

16 Q. I would assume, that within your class of '99, there's  
17 some diversity of opinion about the issues we're discussing in  
18 this case, which is to say whether the Naval Academy should use  
19 race in its admissions process?

20 A. I can't speak to what my classmates -- their opinion on  
21 this issue. I haven't spoken about it with any of them.

22 Q. You don't know whether any of your classmates have  
23 different views about this?

24 A. I haven't spoken with them about any of these issues.

25 Q. Do you think reasonable people can have different views

1 about whether the Naval Academy could use race in its  
2 admissions process?

3 A. Excuse me. Did you say "reasonable people"? I'm sorry.

4 Q. Yes. Do you think reasonable people can have different  
5 views about whether the Naval Academy should use race in its  
6 admissions process?

7 A. I think that definitely reasonable people have different  
8 opinions about everything.

9 Q. And this specific thing as well?

10 A. They can certainly have differing views on this issue, for  
11 sure.

12 Q. Captain Birch, you're on the Naval Academy Admissions  
13 Board, correct?

14 A. Yes, I am.

15 Q. And the job of the Naval Academy Admissions Board is to  
16 review applicants' admissions packages for their academic,  
17 physical, and extracurricular and all of their different  
18 aspects that go into attributing some of the things that you  
19 were looking for as potential members of the U.S. Naval  
20 Academy, correct?

21 A. I would say that's generally correct.

22 Q. And as part of that process, you recommend a candidate as  
23 qualified or not qualified, correct?

24 MR. MENDEZ: Objection, Your Honor. That's outside  
25 the scope of the direct examination.

1           **THE COURT:** It's certainly appropriate. It can be  
2 outside the scope of direct. All of the witnesses, we've  
3 admitted people to approach those. And indeed, Captain Birch  
4 was listed as a may-recall witness by the plaintiff. He's  
5 certainly free to do that. He's not limited just by the scope.  
6 Neither side is limited by the scope in terms of the exchange  
7 of witnesses here.

8           You can continue, Mr. Mortara.

9           **MR. MORTARA:** I'll just repeat the question.

10          **BY MR. MORTARA:**

11          **Q.** As part of that process, you recommend a candidate as  
12 qualified or not qualified, correct?

13          **A.** That's correct.

14          **Q.** Have you ever considered an applicant's race in deciding  
15 whether that applicant was qualified to attend the Naval  
16 Academy?

17          **A.** As -- if race -- as I believe, race is a subset of some of  
18 the different challenges and adversity and others things that  
19 can give an individual strength and indicators of their  
20 potential for success at the Naval Academy, yes. As a subset,  
21 I have included race in those -- those considerations.

22          **Q.** So the answer to the question is yes, you have used race  
23 in considering whether a candidate is qualified?

24          **A.** No. The -- my answer was race is a subset of different --  
25 a broader issue just in terms of different adversity that

1 they've -- life experiences that they've had while they were a  
2 high-schooler, or before they were in high school, that would  
3 indicate if they have the grit and potential for leadership as  
4 midshipmen and certainly later on in their career, potentially.

5 Q. You believe that the board includes race as a subcomponent  
6 of other factors when considering a person's package to be  
7 qualified or not qualified, correct?

8 A. Yes.

9 Q. You commissioned into the Navy SEALs, as you talked on  
10 direct, correct?

11 A. Correct.

12 Q. A lot of midshipmen probably come to the Academy thinking  
13 they will commission into the SEALs, right?

14 A. I believe that it's -- for many, it's a popular choice or  
15 it's a popular interest for many initially, yes.

16 Q. How many SEAL billets were there when you graduated?

17 A. Approximately, when I graduated, there were 16, back in  
18 1999, as I recall.

19 Q. And I think you mentioned, your Overall Order of Merit was  
20 in the top half at least, right?

21 A. As I recall, yes.

22 Q. Do students who graduate at the bottom of the class  
23 regularly get SEAL billets?

24 A. I would -- my guess would be it depends.

25 THE COURT: I'm trying to clarify one thing. I

1 thought he testified in terms of the Military Order of Merit he  
2 was the top 25 percent, not the top 50 percent.

3 **MR. MORTARA:** To clarify, Your Honor, I was referring  
4 to the Overall --

5 **THE COURT:** Overall Order of Merit, he was top half,  
6 yes. Okay.

7 **BY MR. MORTARA:**

8 **Q.** And for the record, you were in the top 25 percent for the  
9 Military Order of Merit?

10 **A.** I believe, as I recall.

11 **Q.** I'll ask the question two ways. Let me strike the  
12 previous question.

13 **MR. MORTARA:** Thank you, Your Honor.

14 **BY MR. MORTARA:**

15 **Q.** Captain Birch, do students who come at the bottom of the  
16 Overall Order of Merit routinely get SEAL billets?

17 **THE COURT:** At the bottom or bottom half is your  
18 question?

19 **MR. MORTARA:** Bottom.

20 **THE COURT:** Okay. Bottom. Okay.

21 **THE WITNESS:** Right. And so the selection process for  
22 Naval Special Warfare, similar to other warfare communities,  
23 it's a combination of numerous different factors to include  
24 your performance in the classroom; your performance in the  
25 hall, as we call it, so your performance as a midshipman; your

1 evaluated performance during summer training, after getting  
2 exposure to these different communities; as well as  
3 incorporating interviews in how well you do to determine your  
4 potential.

5 So I can say potentially, there are individuals that have  
6 accessed into the Naval Special Warfare community from all  
7 ranges of order of merit.

8 Q. But order of merit, and specifically Military Order of  
9 Merit go into which community you can join. There's an element  
10 of preference there, right?

11 A. Can you repeat the question?

12 Q. You can't get into the SEALs if somebody who's superior to  
13 you for the SEALs wishes to be in and there's no more billets  
14 left, right?

15 A. No, so, again, the selection process isn't nearly as  
16 simple as taking a number of where you're ranked academically,  
17 militarily, or even your Overall Order of Merit, it's  
18 incorporating all those different factors and some others that  
19 I just listed off.

20 Q. You don't think that your Military Order of Merit or your  
21 military performance at the Academy influences whether you can  
22 get a SEAL billet?

23 A. No, I'm saying that it's one of many things, but it  
24 certainly is a factor.

25 Q. So the Military Order of Merit is a factor, correct?

1 A. Yes, it is.

2 Q. And the Overall Order of Merit is a factor in getting a  
3 SEAL billet, correct?

4 A. Yes, it is.

5 Q. Stepping outside of your own community, do you agree that  
6 the same is true for aviation?

7 A. I can't really speak to their accession process. But from  
8 my experience, both as a midshipman and certainly now, as a  
9 battalion officer, I can reasonably say that it's also a factor  
10 in other communities as well.

11 Q. Now, you attended the Academy and then Johns Hopkins,  
12 correct?

13 A. Correct.

14 Q. What was your degree from Johns Hopkins?

15 A. So I earned a master's in international public policy.

16 Q. And you got a -- would you agree that SEAL billets are  
17 coveted, people want them?

18 A. I'm sorry, you'd asked me about my time at Johns Hopkins,  
19 I'm confused, Counselor. I'm sorry.

20 Q. No, I'm now asking about SEAL billets out of the Naval  
21 Academy. Would you agree they're coveted; they're scarce, and  
22 people want them?

23 A. I'd agree that for many -- especially initially, when you  
24 first join the Naval Academy or come in the Naval Academy, it  
25 can be a very attractive community for some.



1 Q. So you got a coveted SEAL billet out of the Academy, and  
2 you've made a high rank in the Navy, correct?

3 A. I've achieved the ranking of captain.

4 Q. If the Naval Academy stopped considering race in the  
5 admissions process, you don't know whether the number of  
6 African Americans attending the Naval Academy would decrease,  
7 correct?

8 A. I wouldn't venture to guess on what the impact on changing  
9 our missions process and how that would -- the outcome. I  
10 would say that I believe it would be detrimental if we didn't  
11 include a race as a sub-factor, at least as it informs, I  
12 think, some broader indicators and speaks to the background of  
13 some of our candidates as they come to the Academy.

14 Q. You don't know whether the number of African Americans  
15 would decrease, correct?

16 A. I don't know. I couldn't produce a formula for you to  
17 nail down a number or something like that. I wouldn't make  
18 that speculation.

19 Q. You don't know even whether the number would decrease,  
20 correct?

21 A. Again, I wouldn't venture a guess.

22 Q. It stands to reason then that you don't know whether you  
23 were admitted to NAPS, or the Naval Academy, because of your  
24 race, correct?

25 A. I can assume that I was accepted to the Naval Academy prep

1 school, and eventually the Naval Academy for a multitude of  
2 factors.

3 Q. But you don't know whether your race was one of them; do  
4 you?

5 A. I don't know the admissions policy at the time when I was  
6 accepted.

7 Q. So it's possible you would have been admitted to the Naval  
8 Academy even if Naval Academy didn't use race in admissions;  
9 it's possible, correct?

10 A. Again, I can't speak to what the admissions policies were  
11 back in 1994, 1995 time frame.

12 Q. And in the world where you were admitted to the Naval  
13 Academy without racial preferences, you still would have been  
14 on all of the SEAL teams you mentioned, correct?

15 A. So my assignments and where I've been assigned in my  
16 career has been a factor of, you know, the needs of the Navy,  
17 my family situation, and certainly my performance since  
18 commissioning.

19 Q. Your race hasn't entered into those things, as far as you  
20 know?

21 A. Can you ask the question again, please.

22 Q. Your race hasn't entered into your assignments, as far as  
23 you know?

24 A. So in terms of what -- like, where I've been assigned?

25 Q. Correct.

1 A. Geographically and billets I've held?

2 Q. Correct.

3 A. Not to my knowledge.

4 Q. So in the possible world where you were admitted to the  
5 Naval Academy without racial preferences, you still would have  
6 addressed that racism incident on SEAL Team 8, correct?

7 A. Can you ask the question again, please.

8 Q. You don't know whether you were admitted to the Naval  
9 Academy because of a consideration of your race or not,  
10 correct?

11 A. Again, I'm not sure the admissions policies back in 1995.

12 Q. Therefore, it is entirely possible that even if the Naval  
13 Academy never considered your race, you would have addressed  
14 those racism incidents on SEAL Team 8 in exactly the same way?

15 A. I believe that I handled those situations properly.

16 Q. And you still would have gone to Somalia with SEAL Team 10  
17 like you talked about, correct?

18 A. What was the first part of the question? You --  
19 (Cross-talk.)

20 Q. You still would have gone to Somalia with SEAL Team 10  
21 like you talked about, correct?

22 A. If what? I'm sorry.

23 Q. If you had been admitted to the Naval Academy and they had  
24 no consideration of your race whatsoever.

25 A. Can you ask the question all together? Excuse me.

1 Q. Sure. You earlier testified that you have no idea whether  
2 your race entered into your admission to the Naval Academy,  
3 correct?

4 A. Correct.

5 Q. And therefore, it is entirely possible that every single  
6 thing you discussed today had nothing to do with your race  
7 being a factor in admission to the Naval Academy; is that  
8 right?

9 A. Well, everything that I've discussed today, certainly my  
10 race has been a factor in my -- my life, you know, certainly as  
11 a -- you know, as a commissioned officer in my deployments,  
12 it's been a factor.

13 Q. One hundred percent concede that?

14 A. Yeah.

15 MR. MORTARA: Madam Court Reporter, would you read  
16 back my last question?

17 (Reporter read back as requested.)

18 THE WITNESS: So again, I'm not familiar with the  
19 admissions policies during 1995 or 1995 time frame, so I can't  
20 answer that question.

21 BY MR. MORTARA:

22 Q. You don't know whether race was used in your admissions  
23 decision?

24 That's the last time I'll ask it.

25 A. Correct.

1 Q. And so you don't know whether race being used in an  
2 admissions decision for you to get to the Naval Academy had  
3 anything to do with all of the things you testified about  
4 today, for which we admire you very much, correct?

5 A. I apologize, Counselor, I just don't understand the  
6 question.

7 MR. MORTARA: Madam Court Reporter, could you read  
8 back the question.

9 THE COURT: Well, he heard the question. He doesn't  
10 understand your question.

11 BY MR. MORTARA:

12 Q. My question, sir, is because you don't know whether race  
13 was used in your admission to the Naval Academy, you would have  
14 done all these things even if your race had never been  
15 considered by anybody in entering the Naval Academy, right?

16 A. Again, everything that I've achieved in my career, to say  
17 that my race wouldn't have affected my experiences, my  
18 deployments, how my teams reacted to me, how individuals on  
19 different teams, foreign partners reacted to me, I can't say  
20 that.

21 Q. Thank you, Captain Birch.

22 I want to return to the admissions board, just briefly.

23 A. Of course.

24 MR. MORTARA: I'm going to hand the witness a copy of  
25 Plaintiff's Exhibit 491.

1 THE COURT: Sure.

2 MR. MORTARA: Your Honor, has Plaintiff's Exhibit --

3 THE COURT: It's already been in evidence.

4 MR. MORTARA: Right. But do you need another paper  
5 copy? It's a very short document --

6 THE COURT: Are we going to put this up on the screen?

7 MR. MORTARA: Absolutely.

8 THE COURT: Good. I'll just watch the screen. Thank  
9 you.

10 MR. MORTARA: Great.

11 BY MR. MORTARA:

12 Q. Captain Birch, earlier you testified that you had, in  
13 fact, used race in deciding whether or not someone was  
14 qualified as part of your role on the admissions board.  
15 Remember that?

16 MR. MENDEZ: Objection, Your Honor, with respect to  
17 what the witness said --

18 THE COURT: That's correct. Objection sustained.  
19 That was not the specific answer that he gave.

20 MR. MORTARA: Well, then --

21 THE COURT: The answer was that it was a factor among  
22 many that was considered. The way you phrased the question is  
23 incorrect, and the objection is sustained.

24 MR. MORTARA: Your Honor, I'll be very clear. Sorry.  
25 Using shorthand.

1 BY MR. MORTARA:

2 Q. You earlier testified that you used race as a factor in  
3 deciding whether candidates are qualified for admission into  
4 the Naval Academy. Do you remember that?

5 MR. MENDEZ: Same question. Objection, Your Honor.

6 THE COURT: Same objection is sustained.

7 MR. MORTARA: I thought I just said what Your Honor  
8 just said. I'll do it again.

9 THE COURT: I'll look at my notes, if you want. Not  
10 that I don't trust Ms. Thomas, but I always take pretty  
11 extensive notes on these. And I'll look back, if you want.  
12 But you're not correctly characterizing what the question was  
13 and his answer. He did not give the answer that you've  
14 indicated.

15 MR. MORTARA: Okay. I'm going to --

16 THE COURT: He did not specifically say he considered  
17 race. He said it was considered, among other factors. I  
18 understand where you want to go with this, Mr. Mortara, but you  
19 can so state a question. But that's not what his earlier  
20 answer was.

21 MR. MORTARA: I'm going to try it again.

22 THE COURT: That's fine.

23 MR. MORTARA: Fourth time will be really awful.

24 THE COURT: Okay. Fine.

25 MR. MORTARA: Your Honor --

1           **THE COURT:** Try not saying that race was a factor. It  
2 is a factor that was considered, among other factors. I think  
3 that's where the problem is.

4           **MR. MORTARA:** Thank you, Your Honor.

5           **THE COURT:** Okay. That's fine.

6 **BY MR. MORTARA:**

7 **Q.** You earlier testified that race was a factor that was  
8 considered, along with other factors, in deciding whether a  
9 candidate would be deemed qualified. Do you remember that?

10 **A.** I remember that. It was as a subset of different factors,  
11 yes.

12 **Q.** I want to turn to a slide in this board training process.  
13 This is from 2023. There's been earlier testimony about that.  
14 You attended the board training in 2023, correct?

15 **A.** Correct.

16 **Q.** Do you remember a presentation by Christie Munnelly?

17 **A.** I remember her training. I don't sort of remember  
18 everything. But certainly, she ran training.

19 **Q.** I'm going to show you the admissions board review slide,  
20 and I doubt you remember this specific slide, although it  
21 appears to be recycled from year to year.

22 But you see the slide on the screen, correct?

23 **A.** I do.

24           **MR. MORTARA:** This is ending in 782, Your Honor.  
25



1 BY MR. MORTARA:

2 Q. And then at 89, there's a listing of admissions board  
3 members.

4 Do you see that?

5 A. I do.

6 Q. And you are the Battalion Officer 1 on the admissions  
7 board, correct?

8 A. Correct.

9 Q. How many years have you been on the admissions board.

10 A. I'm just starting my second year. So last year was my  
11 first academic year and my first year on the admissions board.

12 Q. So this is the -- we're looking at the training you  
13 received for your first year on the admissions board, correct?

14 A. I believe so. I can't say for certain if this was -- this  
15 slide was from the first year and/or the second year. I don't  
16 know.

17 Q. I will do my best to make sure that we can identify -- I'm  
18 showing you the second slide in the document.

19 When did Superintendent Rear Admiral -- Kacher, is it?

20 A. It's Kacher.

21 Q. Kacher become superintendent?

22 A. Last year, as I recall.

23 Q. So 2023?

24 A. Correct.

25 Q. Now let's go to Ms. Munnelly's presentation. We're back

1 on the admissions board. You're the battalion officer.

2 Now let's go to a few slides ahead, Bates Numbered 785.

3 "What does the admissions board do?" This is the training from  
4 2023, "Determine Qualification for Admission."

5 Do you happen to remember this slide?

6 A. I don't remember this exact slide, but I'm familiar with  
7 these words.

8 Q. You actually did the training again just a few weeks ago,  
9 right?

10 A. So I actually wasn't present for that training two weeks  
11 ago.

12 Q. All right. So you missed it. Okay. That's fine. We've  
13 had other testimony from the training two weeks ago. We'll  
14 skip that.

15 **MR. MORTARA:** I'm now going to the slide numbered 97,  
16 Bates Numbered for the record in Plaintiff's Exhibit 491, Your  
17 Honor, ending in 792.

18 **THE COURT:** Yes.

19 **BY MR. MORTARA:**

20 Q. It says "Assessment of the Whole Person."

21 And I just want to confirm this is what you were talking  
22 about. It says you can use these factors. And among the many  
23 factors you can consider is someone's ethnic heritage, racial  
24 and ethnic diversity.

25 That's what you were talking about before with me; is that

1 right?

2 A. So before, I was referring to, again, the unique life  
3 experiences versus the other things where race might be a  
4 subset of those things.

5 Q. And this training that you received from Ms. Munnelly  
6 reflects your view that, among other factors, race can be used  
7 to determine whether a candidate is qualified, correct?

8 MR. MENDEZ: Objection, Your Honor. Mischaracterizes  
9 the witness's testimony.

10 THE COURT: No, no, that's a correct question, based  
11 upon the document. Objection is overruled.

12 You may proceed, Mr. Mortara. Captain Birch may answer  
13 that question.

14 THE WITNESS: Yes.

15 MR. MORTARA: No more questions, Your Honor.

16 THE COURT: All right. Thank you, Mr. Mortara.

17 Mr. Mendez, any redirect?

18 MR. MENDEZ: Nothing further, Your Honor.

19 THE COURT: All right. Captain Birch, you may step  
20 down, sir. Thank you, as always, for those who are still in  
21 the military. Thank you for your service to our country.  
22 You're excused.

23 You shouldn't discuss your testimony with anyone in the  
24 event that perhaps you'll be called back before this trial  
25 ends, at the end of next week.

1           **MR. MORTARA:** Your Honor, before Captain Birch leaves,  
2 may I have permission to shake his hand?

3           **THE COURT:** I'm sorry?

4           **MR. MORTARA:** May I shake his hand?

5           **THE COURT:** Actually, there's no reason to do all  
6 that. We haven't done it with all the other witnesses. So  
7 it's better not. That's fine. You're welcome to show the  
8 respect. But that's fine.

9           **MR. MORTARA:** Usually, I introduce myself to them  
10 before they take the stand.

11          **THE COURT:** That's quite all right.

12          **MR. MORTARA:** It was a pleasure to meet you, and thank  
13 you for your service.

14          Your Honor, the defendants will next call Mr. Steve Vahsen  
15 from the Naval Academy --

16          **THE COURT:** Okay. Plaintiff is calling or defense is  
17 calling?

18          **MR. MORTARA:** Plaintiff. He has a rank; it is  
19 captain. But he's retired.

20          **THE COURT:** Okay. That's fine. This is Steve Vahsen?  
21 Is that V-A-H-S-E-N?

22          **MR. MORTARA:** I think it's Vahsen.

23          **THE COURT:** We'll find out. It's not as difficult as  
24 the professor's name, Arcidiacono. And I still have not been  
25 able to pronounce that correctly. And that's my failing.

1           **MR. MORTARA:** I am the veteran of a four-week trial  
2 with Professor Arcidiacono --

3           **THE COURT:** Then you had a better shot at learning how  
4 to pronounce his name than I did.

5           (Laughter.)

6           **MR. MORTARA:** But while we're waiting, we were going  
7 to church together on Sundays, so I really had to learn his  
8 name because we were sitting next to each other at mass.

9           **THE COURT:** All right.  
10 Welcome, sir. If you can remain standing and be sworn as  
11 a witness. Thank you very much.

12           **THE CLERK:** Raise your right hand.

13           (Witness sworn.)

14           **THE CLERK:** You may have a seat. Will you please  
15 state and spell your first and last name for the record.

16           **THE WITNESS:** Steven Vahsen; S-T-E-V-E-N; last name is  
17 V- as in Victor, -A-H-S-E-N.

18           **THE CLERK:** Thank you very much.

19           **MR. MORTARA:** Your Honor, may I proceed?

20           **THE COURT:** You certainly may, Mr. Mortara.

21                           **DIRECT EXAMINATION**

22           **BY MR. MORTARA:**

23           **Q.** Mr. Vahsen, the Court has a preference that former service  
24 members, even if they are retired from the service, be  
25 addressed by their rank. So if you don't mind, I will call you

1 Captain Vahsen.

2 A. Yes, sir.

3 THE COURT: Captain Vahsen, you're retired from the  
4 U.S. Navy; is that correct?

5 THE WITNESS: Yes, Your Honor.

6 THE COURT: Welcome. Nice to have you, sir.

7 THE WITNESS: Thank you.

8 BY MR. MORTARA:

9 Q. Did I get your rank correct?

10 A. Yes, sir.

11 THE COURT: Actually, Mr. Mortara, I want to make sure  
12 we indicate no disrespect to the public at large. The rank of  
13 a Navy captain is not the same as an Army captain. And a Navy  
14 captain is an 06, equal to an Army colonel. And an Army  
15 captain is, I believe, an 03. So it may be a statement of the  
16 obvious to those people here in the courtroom. But given the  
17 public interest in this, we should note that the rank of a Navy  
18 captain is just one level below an admiral.

19 MR. MORTARA: Your Honor, one of the many, many  
20 humbling things that have occurred to me in the last  
21 three weeks is that I learned that.

22 THE COURT: That's good. That's right. I'm not  
23 suggesting you didn't know. I'm just putting it on the record.

24 MR. MORTARA: I really didn't know it.

25 THE COURT: You did not know?

1           **MR. MORTARA:** No, I did not.

2           **THE COURT:** Well, I'm not going to hold that against  
3 you, nor would anybody else. But don't ever say that to a Navy  
4 captain. Okay?

5           **MR. MORTARA:** I just did.

6           (Laughter.)

7           **THE COURT:** We're laughing here, it's fine. Go ahead.

8 **BY MR. MORTARA:**

9 **Q.** Welcome, Mr. Vahsen.

10           **THE COURT:** Captain Vahsen.

11           **MR. MORTARA:** Captain Vahsen. Sorry.

12 **BY MR. MORTARA:**

13 **Q.** Welcome, Captain Vahsen.

14           Because we're the plaintiffs and we're calling you in our  
15 case, usually your side gets a chance to bring out your  
16 background, and I'm going to do that for you just to introduce  
17 you to the Court.

18           Where did you attend college, and when did you graduate?

19 **A.** United States Naval Academy in 1985, sir.

20 **Q.** And we just earlier had a little discussion about  
21 something called the Overall Order of Merit.

22           If you don't mind me asking, what was your Overall Order  
23 of Merit, if you remember?

24 **A.** I was second in my classes, sir.

25 **Q.** Did you say second?

1 A. Yes, sir.

2 THE COURT: The answer was second in his class,  
3 meaning his class rank, he was second.

4 Is that your answer, Captain?

5 THE WITNESS: Yes, Your Honor.

6 THE COURT: All right. Means there's only one person  
7 ahead of him.

8 (Laughter.)

9 BY MR. MORTARA:

10 Q. Congratulations.

11 A. It's a long time ago.

12 Q. What degrees have you obtained?

13 A. I have a Bachelor of Science in Applied Science from the  
14 Naval Academy.

15 Q. What was your first job when you commissioned into the  
16 Navy?

17 A. First real job after flight training was I served in a  
18 squadron as a junior officer, both flying as a naval flight  
19 officer as well as various ground jobs within the squadron.

20 Q. And I understand you spent 30 years on active duty; is  
21 that right?

22 A. Yes, sir.

23 Q. And we already talked -- you made O6, correct?

24 A. Yes, sir.

25 Q. The last five of your years of active duty, you were a



1 chief of staff to the superintendent of the Naval Academy,  
2 correct?

3 A. Yes, sir.

4 Q. What's the job of the chief of staff to the  
5 superintendent?

6 A. You kind of coordinate all operations that happen. In  
7 this case, on the campus, you're seeing all the paperwork.  
8 You're ensuring that when it gets to the admiral, most of the  
9 decisions and hard things have already been worked out. You're  
10 kind of -- keep the train on the tracks and coordinate  
11 everything within the various entities on the campus.

12 Q. What years were those that you were chief of staff?

13 A. 2010 to 2015.

14 Q. And you weren't here for my opening statement. I think I  
15 got this right.

16 You have served under five superintendents?

17 A. Yes, sir.

18 Q. What is your current position at the Naval Academy?

19 A. I am the executive director for strategy.

20 Q. Can you describe to the Court what that means, what your  
21 job role is.

22 A. Yes, sir. Unlike many of the entities in our campus, the  
23 front office, the superintendent's office is primarily military  
24 individuals that revolve every couple of years.

25 So one of the primary things I do is I provide continuity

1 within that office of about 10 to 15 individuals.

2 I am primarily advice and counsel to the superintendent;  
3 not legal counsel, but other forms of counsel.

4 Any long-term strategy assessment-type projects.

5 And then I'm the primary liaison with the Naval Academy  
6 Foundation, which is a nonprofit organization that raises funds  
7 for the Naval Academy.

8 Q. You feel yourself, nevertheless bound -- withdrawn.

9 You feel yourself bound to follow the directives of the  
10 superintendent, correct?

11 A. Absolutely. Yes, sir.

12 Q. And notwithstanding your retirement, Captain Vahsen, you  
13 feel bound to follow Department of Defense directives, correct?

14 A. Yes, sir.

15 Q. Not notwithstanding your retirement, you feel yourself  
16 still to be in the chain of command?

17 A. I'm not sure I would say I was in chain of command.  
18 Nobody works for me.

19 Q. Thank you, Mr. -- Captain Vahsen.

20 I want to talk a little bit about some of your role doing  
21 strategy assessments and data collection for the Academy.

22 You have a binder in front of you, and I'm going to refer  
23 to Plaintiff's Exhibit 151 that has been previously admitted.

24 And first of all, I'll ask you, Captain Vahsen, do you  
25 have a habit of emailing yourself large numbers of documents so

1 that you have them somewhere?

2 A. I occasionally do email myself so I have records of items;  
3 yes, sir.

4 Q. I have done that myself as well.

5 I'm actually going to ask you specifically about the one  
6 that's highlighted on the screen, which is  
7 22-23USNADashboard.xlsx.

8 And you will find a portion of that document behind the  
9 tab labeled 151-4. You should see one that says 151-4. There  
10 you go.

11 A. Yes, sir.

12 Q. It's also on the screen, if it's easier to follow along  
13 there.

14 MR. MORTARA: This is one sheet from a giant Excel  
15 that is part of the record, Your Honor. The native document's  
16 been submitted to the Court.

17 THE COURT: Yes.

18 MR. MORTARA: We have one sheet printed out here. For  
19 the Court's benefit, this is the one that was shown in opening  
20 statement.

21 THE COURT: Yes. It's the one to which you referred  
22 in your opening statement.

23 MR. MORTARA: Yes.

24 THE COURT: Yes.

25

1 BY MR. MORTARA:

2 Q. You prepared this, correct, Captain Vahsen?

3 A. Yes, sir.

4 Q. I want to focus first on the bottom left two panes, the  
5 graduation rates.

6 You were deposed in this case, correct?

7 A. Yes, sir.

8 Q. You were deposed by my colleague, Mr. Strawbridge, who  
9 bears some resemblance to me, correct?

10 (Laughter.)

11 A. Yes, sir.

12 Q. All right. I think you were shown versions of what is  
13 shown here, but the versions you were shown in your deposition  
14 were black and white, and you had trouble reading them. Do you  
15 remember that?

16 A. I do; yes, sir.

17 Q. So now we're looking at them in color.

18 Can you explain to the Court what's being shown just on  
19 the two on the left.

20 A. Yes, sir. The top one is the graduation rate by race and  
21 ethnicity, where -- by class here, where race and ethnicity, in  
22 the top graph, is broken out solely about Caucasian and  
23 non-Caucasian, or minority, as it's indicated. And then the  
24 lower graph is broken out in more granular detail by specific  
25 demographic of race and ethnicity that we -- the major ones

1 that we track.

2 Q. And I have a couple questions.

3 One is: What is the "DoD Minimum" dash line in the upper  
4 pane?

5 A. We have a guideline from the Department of the Defense in  
6 which we are supposed to graduate at least 75 percent of each  
7 class; not necessarily by any specific demographic or anything  
8 like that, but as a whole, by 75 percent.

9 Q. You anticipated my next question, but now that the -- the  
10 second next question is: Does the Academy, nevertheless,  
11 consider it to be a problem if specific groups fall below that  
12 75 percent threshold?

13 A. Not necessarily a problem, sir. You know, sometimes we  
14 have demographics where there's only, for example, two people  
15 or three people in a demographic. Maybe it's Native American,  
16 for example. And so if one person doesn't graduate, then it's  
17 two out of three. We more or less look at trends to see if  
18 there's trends. Certainly, if something drops quite low in a  
19 certain year, we'll look at it and see if there's a root cause.  
20 But we primarily look at trends, sir.

21 Q. So, Captain Vahsen, there are large groups; for instance,  
22 "All Minorities" or the specific minorities listed on the lower  
23 pane.

24 Would the Academy consider it to be a problem if those  
25 graduation rates fell below 75 percent?

1 A. It would be worth looking at to see if there's a root  
2 cause.

3 Q. And for the Court's benefit, would you please explain the  
4 steep dropoff in 2023. I think you told us something about  
5 that before, but please explain it to the Court.

6 A. In 2023, that year group, that class had a unique  
7 challenge. They entered the Naval Academy during the time of  
8 the COVID pandemic. So their entire four-year journey was a  
9 little bit nontraditional. Especially the first year and the  
10 first two years of the Academy are quite challenging for most  
11 midshipmen that attend. And in those years, they spent a lot  
12 of time isolated within their rooms. A lot of time of online  
13 learning. A lot of time where they couldn't leave the campus  
14 whatsoever. And, most importantly, they did not get a chance  
15 to go visit the fleet.

16 So during the summer, they go to ships, they go to  
17 squadrons, they go to submarines, which is the "why" of why  
18 many folks actually come to the Naval Academy. And during that  
19 time frame, they couldn't do that. So they're doing the grind  
20 without being able to do the good stuff.

21 Also, many of our students are athletes. And during those  
22 first two years, they couldn't participate quite a bit in their  
23 sports. And for many midshipmen that come to the Naval  
24 Academy, the opportunity to play in a varsity sport is a  
25 driving factor of why they come here, in addition to

1 potentially serve down the road. But it's a driving factor.

2 So I think all of those things had a significant impact on  
3 retention in 2023.

4 Q. Thank you, Captain Vahsen.

5 Looking at the lower pane, "Graduation Rate by Race and  
6 Ethnicity," will you agree that while in 2016, the  
7 African American graduation rate approached the Caucasian rate,  
8 at all times shown here, the African American graduation rate  
9 has been below the Caucasian graduation rate?

10 A. Yes, sir.

11 Q. And would you agree that for some of the time, the  
12 Hispanic graduation rate has been below the Caucasian  
13 graduation rate?

14 A. Yes, sir, for some of the time.

15 Q. I want to turn to Plaintiff's Exhibit 479. And that's in  
16 your binder, but we'll also have it up on the screen.

17 This is a document ending Bates label 26677. It's  
18 entitled "USNA Class Years 2006 to 2022, Graduation Rate by  
19 Race Ethnic Group."

20 Do you see that?

21 A. Yes, sir.

22 Q. And is this something that comes or data that you would  
23 access to prepare graphs like the ones we just looked at?

24 A. For various things I do as part of my job; yes, sir.

25 Q. And to orient the Court and you, Captain Vahsen, the

1 spreadsheet shows by different race and ethnic group, the  
2 graduation rate overall from both each year individually, and  
3 then a computed average, correct?

4 A. Over that period from 2006 to 2022; yes, sir.

5 Q. And it does not include the COVID year we just discussed,  
6 2023, correct?

7 A. That's correct; yes, sir.

8 Q. The graduation rate for White midshipmen over that period,  
9 2006 to 2022, is 88.6 percent, correct?

10 A. Yes, sir.

11 Q. The graduation rate for Hispanic or Latino midshipmen is  
12 83.2 percent over that period, correct?

13 A. Yes, sir.

14 Q. And on the next page, the graduation rate for Black or  
15 African American is 77.3 percent, correct?

16 A. Yes, sir.

17 Q. Now, to be fair, Captain Vahsen, there is a listing for  
18 "Two or More Races."

19 Do you see that?

20 A. Yes.

21 Q. Sometimes the Academy reports Black or African American as  
22 exclusively, solely Black or African American, and sometimes it  
23 will report that statistic as anyone who considers themselves to  
24 be any part African American; is that right?

25 A. That's correct; yes, sir.



1 Q. And the way we're looking at it here, is these are people  
2 who exclusively consider themselves Black or African American,  
3 right?

4 A. In the part that says "Black or African American"; yes,  
5 sir.

6 Q. Let's go back to the dashboard document. I want to focus  
7 now on the panel in the bottom right.

8 Again, you weren't here, but during my opening statement,  
9 I showed the Court this and was meant to only touch on it  
10 briefly, but the Court had a lot of questions, and the Court  
11 may have questions now.

12 MR. MORTARA: Which, Your Honor, please feel free to  
13 interrupt me at any point, as I'm sure you do.

14 BY MR. MORTARA:

15 Q. Let's orient to this graphic. This is attrition by type  
16 for the class years of 2014 to 2023, right?

17 THE COURT: You're back in Exhibit 151, correct?

18 MR. MORTARA: It's 151. It's a native attachment to  
19 151, Your Honor, yes.

20 BY MR. MORTARA:

21 Q. This is attrition by class year, correct?

22 A. By class year, by attrition type; yes, sir.

23 Q. And then different types are medical, conduct-honor,  
24 voluntary, academic, physical, and LOA, right?

25 A. Those are the ones listed on the graph; yes, sir.

1 Q. I think the first five are self-explanatory.

2 What is LOA?

3 A. That is a term called leave of absence so -- yes.

4 Q. And to again orient the Court, in 2023, there's almost a  
5 record number of voluntary separations.

6 Do you see that? 87?

7 A. Yes, sir.

8 Q. Is that part of the phenomenon that you were discussing  
9 earlier?

10 A. Yes, sir. We primarily had a very large jump in voluntary  
11 resignations that year.

12 Q. And you also see there was a somewhat higher than normal  
13 number of academic attritions, right?

14 A. Yes, sir. Mostly attributable to online education, which  
15 is not as effective as in-person.

16 Q. I think you told us that there was a widening of the gap  
17 between minority and Caucasian graduation rates that we saw  
18 earlier on the other part of the screen. You've previously  
19 told us that. And that you thought that widening had something  
20 to do with varsity sports and, as you put it, the Academy  
21 taking more risk on those candidates; is that right?

22 A. Can you rephrase that question, please. Or say it again.

23 Q. What does it mean to you that the Academy takes more risk  
24 on varsity athletes?

25 A. There are certain athletes that we bring in that may not

1 have the same academic credentials as other candidates. They  
2 possess other characteristics that we think are very important  
3 in both a midshipman and a naval officer. So we'll take some  
4 risk and allow them to come in. We think they can still  
5 graduate, but some of those varsity athletes, we term them  
6 blue-chip athletes, come in with a bit of a challenge  
7 academically. And additionally, due to their schedules being  
8 very intensive in how much time they devote to their sport and  
9 how much travel they do and miss class, they're at a bit of a  
10 disadvantage academically.

11 **Q.** Thank you, Captain Vahsen.

12 That risk that you just discussed, that could show up  
13 either in academic attrition or, for all we know, voluntary  
14 attrition as well, correct?

15 **A.** I suppose it could. Usually, individuals indicate why  
16 they depart the Naval Academy. Everybody that departs, we  
17 survey them and ask them. And most reasons, almost  
18 exclusively, are they decided that the military really isn't  
19 for them and the school really isn't for them. They don't  
20 select academics, which is one of the choices.

21 **Q.** I want to pivot off of something you just said about  
22 blue-chip athletes and show you one of the middle panes.

23 **MR. MORTARA:** Your Honor, you can see it, "Graduation  
24 Rate by Athletic Participation."

25 **THE COURT:** Yes.

1 BY MR. MORTARA:

2 Q. Can you explain to the Court what's being shown here.

3 A. Yes, sir. So again, this is by class year, and it depicts  
4 three different categories. The green one is the non-varsity  
5 athletes, which is roughly two-thirds of our midshipmen  
6 population. The yellow one is all varsity athletes, anybody  
7 that participates in one of our 36 varsity sports. And the  
8 blue-chip are those individuals that I alluded to earlier that  
9 usually come in with an academic challenge.

10 And it shows each one of those graduation rates by year.

11 Q. And I would presume, but you should tell me if I'm wrong,  
12 that the reason that the blue-chip line is lower than the all  
13 varsity athletes line is because of some of the risks you were  
14 discussing with me?

15 A. That, yes, sir. And usually, if they're better athletes,  
16 like really good athletes, there is a chance that they could  
17 get -- go to another school and get on another program as well.

18 Q. And by that you mean -- you agree that one of the problems  
19 is that football players at the Academy may also have other  
20 options that they can pursue before they have to make their  
21 commitment to finish out their time with the Navy, right?

22 A. I think any midshipmen has that opportunity. But yes,  
23 football players and other athletes, yeah.

24 Q. And that includes the availability of the transfer portal,  
25 and now NIL being available at other institutions that athletes

1 cannot get from the Academy, correct?

2 A. Yes, sir.

3 MR. MORTARA: And for the Court's -- I think the Court  
4 has observed this in the past, NIL stands for --

5 THE COURT: Name, image, likeness.

6 MR. MORTARA: Thank you, Your Honor. I did know that  
7 before I started this case.

8 THE COURT: Can I interject a question while you're  
9 here, Mr. Mortara, to follow up with Captain Vahsen.

10 How did these graduation rates interact with respect to  
11 the two-year period? I'm not sure if it's come up as much so  
12 far in this case.

13 All midshipmen, be they athletes or not, have to make a  
14 decision at the two-year mark, correct?

15 THE WITNESS: Yes, Your Honor.

16 THE COURT: And how did that impact in terms of COVID  
17 as to those who were in the first or second year, where they  
18 still have an option to make a decision whether they're going  
19 to stay in the military or not at the two-year mark? How did  
20 the COVID affect that? Was there a higher rate of first- and  
21 second-year students that decided just to drop out before the  
22 two-year mark or what? It would be helpful for me to know  
23 that.

24 THE WITNESS: Yes, Your Honor. As you're probably  
25 aware, if they stay past two years and leave for any reason,

1 they'll either have to serve --

2           **THE COURT:** They have a service committal --

3           **THE WITNESS:** They have a service or a monetary  
4 recoupment obligation.

5           **THE COURT:** Yes.

6           **THE WITNESS:** And so the majority, especially of our  
7 voluntary resignations, almost exclusively happen in those  
8 first two years.

9           **THE COURT:** And is that factored in the graduation  
10 rate for a particular class?

11           **THE WITNESS:** Yes, sir, it's all wrapped in.

12           **THE COURT:** All wrapped.

13           So to the extent -- let's say the class of 2021 had a  
14 certain non-graduation rate or they were not -- they did not  
15 graduate, that might have been reflected the previous two years  
16 when they dropped out, say after a semester or two semesters.

17           **THE WITNESS:** Absolutely. Those rates you see are  
18 not --

19           **THE COURT:** Just one year. It's a particular class.

20           **THE WITNESS:** It's that particular class. And we're a  
21 little bit unique from most colleges and universities; almost  
22 all of our individuals stay in that class year and graduate  
23 within four years.

24           **THE COURT:** Yes. And I gather that -- the other  
25 question I'd ask, if you don't mind, Mr. Mortara, to follow on

1 what you were doing, is that to the extent there was an effect  
2 of COVID, do you have any knowledge as to once people broke  
3 past that two-year mark and they had a service commitment  
4 thereafter, what kind of attrition there was? Was there any  
5 sense that you had there still the same rate of attrition or  
6 not, people dropping out of the Academy at that point?

7 I guess my question is: How many juniors and seniors  
8 dropped out during COVID, having already hit the mark where  
9 they've got a military commitment hanging over them?

10 **THE WITNESS:** That percentage did not rise  
11 appreciably. The greatest rise is all in the voluntary -- all  
12 the voluntary in the first two years --

13 **THE COURT:** And all usually in the first two years is  
14 where it occurs?

15 **THE WITNESS:** Yes, sir.

16 **THE COURT:** It might be helpful for you.

17 **MR. MORTARA:** Your Honor, I might be able to be  
18 slightly more helpful.

19 **BY MR. MORTARA:**

20 **Q.** Mr. Vahsen, this email is dated June 30th, 2023, but the  
21 data that's being pulled here, there are dashed lines  
22 associated with the class of 2023, is that because maybe this  
23 data was pulled in the spring; by the spring, you essentially  
24 know what the attrition is going to be because all of it is  
25 front-loaded -- or a lot of it is front-loaded to the first

1 years, but when it's dashed here, that's representing an  
2 assumption of what the attrition is going to be?

3 A. So I can't tell you when the data was pulled. I don't  
4 recall for this specific graphic that you have here. But we do  
5 have some individuals, you know, less than two dozen usually,  
6 that may extend past 47 months, that may extend past the  
7 graduation rate. Maybe they have a medical issue that's still  
8 trying to be resolved, if they can commission. Maybe they have  
9 to take one class during summer school for some reason. There  
10 are extenuating circumstances.

11 So this data, we actually compile it in a report that goes  
12 out in December. And so by then, we'll have everything  
13 finalized. So there's some cats and dogs that haven't been  
14 included in this, but it's very close to the final answer.

15 Q. And when, just for the record, do you consider the  
16 graduation rate locked, such that you would show it without a  
17 dashed line?

18 A. We publish an annual report that's normally published in  
19 December.

20 Q. Thank you, Captain Vahsen.

21 Let's talk about academics again.

22 **THE COURT:** This might be a good point to stop now for  
23 a late-morning break. And we'll take about a 10-minute recess.

24 Obviously, Captain Vahsen, you're on the witness stand, so  
25 don't discuss anything with anybody in the hallway.



1 We'll take a 10-minute recess.

2 THE CLERK: All rise. This Honorable Court is now in  
3 recess.

4 (A recess was taken from 11:50 a.m. to 12:03 p.m.)

5 THE CLERK: All rise. This Honorable Court now  
6 resumes in session.

7 THE COURT: You may continue.

8 You may all be seated.

9 Captain, you may take the witness stand.

10 MR. MORTARA: Thank you, Your Honor.

11 BY MR. MORTARA:

12 Q. Hello again, Captain Vahsen.

13 I want to talk to you a little bit about the fact that you  
14 graduated number two in the order of merit just for a second.

15 Because you graduated so high in your class, did that help  
16 you get your choice of initial assignment?

17 A. We call it -- back then, we called it service selection.  
18 At that time, yes, it had a -- it was the determinative factor  
19 back then. But it's not the case. We do service assignments  
20 now.

21 Q. It's still the case that order of merit has an influencer,  
22 a role in service assignment, correct?

23 A. For some of the -- every community chooses the rubric by  
24 which they decide how to select individuals or opt to select  
25 individuals. Everyone's is different. Some of them prioritize

1 order of merit; some of them, it's not that important.

2 Q. Does aviation still prioritize order of merit?

3 A. I don't know.

4 Q. Do you know about any of the communities in this respect?

5 A. Submarine community certainly does.

6 Q. Submarine still prioritizes order of merit.

7 What about Special Warfare?

8 A. I don't know, sir.

9 Q. So at least subs -- submarines --

10 A. Submarines, they care about what your academic grades are.

11 Q. Let's go back to academics.

12 You've seen academic attrition at the Academy broken down  
13 by math SAT scores, correct?

14 A. I have used that in the past to normalize data; yes, sir.

15 Q. And I think you'll recall, if you normalize candidates by  
16 SAT math score, that African American and Hispanic midshipmen  
17 are no more likely to suffer academic attrition; isn't that  
18 right?

19 A. I wouldn't say "no more likely," but it's fairly  
20 normalized, and that's for the first year or two.

21 Q. So just to be clear to the Court, in the raw data,  
22 African American and Hispanic midshipmen suffer academic  
23 attrition at higher rates than White midshipmen in the raw  
24 data, right?

25 A. A little bit higher; yes, sir.

1 Q. But if you normalize and consider the SAT math scores,  
2 most of that difference goes away; is that right?

3 A. Yes, sir, for overall attrition, yeah. Yeah.

4 Q. But the best predictor of how someone is going to do, at  
5 least in the first two years, is the whole-person multiple,  
6 right?

7 A. There's a strong correlation; yes, sir.

8 Q. You remember that the midshipmen equity report found that  
9 African American midshipmen were 4.6 times more likely to be  
10 subject to academic separation, right?

11 A. I believe that's the number; yes, sir.

12 Q. That's behind your binder at Plaintiff's Exhibit 148.

13 And again, to orient the Court, this is an email from you  
14 to David Forman.

15 Who is David Forman?

16 A. He's the deputy commandant of midshipmen.

17 Q. And there's an attachment, "MidEquityStudy.pdf," correct?

18 A. Yes, sir.

19 Q. And before we get into the actual study, I want to note  
20 and make sure that we have your comment here, "I don't  
21 necessarily agree with some of the methodology, nor the facets  
22 that were left out of the report."

23 Do you see that?

24 A. Yes, sir.

25 Q. I will ask you in a little bit to describe to the Court

1 what you remember of your concerns here.

2 Let's turn to the report. The report is titled "Summary  
3 Assessment of Midshipmen Equity by Race/Ethnic Group." And  
4 there's a group of, I believe, midshipmen that are listed as  
5 the authors, correct?

6 A. Several of them are midshipmen; yes, sir.

7 Q. Some of them are not?

8 A. That's correct.

9 Q. Identify the people who are not, and tell me who they are,  
10 please.

11 A. Timika Lindsay. Captain Timika Lindsay, at that time, was  
12 the chief diversity officer.

13 Q. Anyone else?

14 A. Cathy McGuire is a -- somebody who works in our  
15 institutional research, so she didn't author the report, but  
16 she certainly provided some of the data.

17 I know Max Wakefield is professor -- or was a professor.  
18 I think he's still at the Academy. I'm not positive.

19 Q. So now we have a group of midshipmen not highlighted and a  
20 group of individuals, including one active duty person from the  
21 Naval Academy, correct?

22 A. Yes. But I don't know who Brice -- forgive me, I can't --  
23 Nguelifack. I don't know who he is.

24 Q. And one unknown. Thank you, Captain Vahsen.

25 I want to first go to the data that was provided, what

1 years the data covered from this report. And I'm just going to  
2 go to the page -- what's listed as Page 4. And you see that  
3 the data used for this report is class years 2014 to 2020.

4 Do you see that?

5 A. Yes, sir.

6 Q. And now to a section that you discussed at your  
7 deposition, on Page 7, this is "Academic Separations by Race or  
8 Ethnic Group."

9 Do you see that?

10 A. Yes, sir.

11 Q. And you see some differences being reported here in the  
12 form of an academic separation quotient ratio where Whites have  
13 a .4 and Black, African Americans have 1.76, correct?

14 A. Yes, sir.

15 Q. And that's where you get the 4.6 times more likely -- it's  
16 actually at the top of the screen -- 1.76 divided by .4, right?

17 A. Sir, I did not generate these numbers. I'm not sure all  
18 the math they used in this, but it seems reasonable.

19 Q. Yeah, I think 1.76 divided by .4 is 4.6.

20 And then I'm highlighting on the screen their statement  
21 that we just talked. "In particular, Black, African American  
22 midshipmen are 4.6 times more likely than White midshipmen to  
23 be separated by academics."

24 Do you see that?

25 A. Yes, sir.

1 Q. And to be fair, that number of academic separation is 28;  
2 it's fairly small, you'd agree, over the relevant period?

3 A. Over the seven-year period, that's about four per year;  
4 yes, sir.

5 Q. Now, I told you I was going to ask you this. You did say  
6 you had some issues with the methodology and some facets that  
7 were left out.

8 Please take this opportunity to tell the Court what issues  
9 you had, if you remember.

10 A. And I don't -- I haven't read the report. I've only read  
11 it once or twice, and it's been several years.

12 But I distinctly remember that they pointed out, they  
13 highlighted academic attrition. They highlighted physical  
14 readiness attrition. And I believe one other attrition source.  
15 Each of those are very small components of why somebody leaves  
16 the Academy or separated from the Academy. So our academic  
17 attrition averages around 1 to 1-and-a-half percent.

18 People primarily leave due to voluntary attrition, as you  
19 saw in some of the graphs prior. That normally accounts for 50  
20 to 60 percent of the attrition. In that case, African  
21 Americans tend to be on the lower scale of all race and  
22 ethnicity for attrition.

23 So I found it -- I think they were cherry-picking the data  
24 a little bit in their presentation.

25 Q. Captain Vahsen, is that all that you remember of the

1 criticisms you were outlining in the email?

2 A. I do not agree with a lot of conclusions they came up with  
3 as well.

4 Q. Captain Vahsen, you didn't say there was anything wrong  
5 with the raw data that they used, right?

6 A. I had no reason to believe that the data was incorrect. I  
7 didn't examine the data.

8 Q. And just showing you, from the acknowledgement, they got  
9 that data from the Naval Academy itself, correct?

10 A. Yes, sir.

11 Q. I want to go over one more thing with you from this paper,  
12 which is at Page 14 of the paper, and there's a graphic --

13 THE COURT: Again, this is Plaintiff's Exhibit 148?

14 MR. MORTARA: That is correct, Your Honor. The first  
15 page of the exhibit is an email from Captain Vahsen. And then  
16 the back, the attachment, is the article --

17 THE COURT: Yes.

18 MR. MORTARA: -- paperwork.

19 BY MR. MORTARA:

20 Q. This is a graphic showing "Representation Quotient by OOM  
21 Interval."

22 Do you see that?

23 A. Yes, sir.

24 Q. And this data shows that, according to the paper and the  
25 text below -- which I can put on the screen, and I will in a

1 second -- Black midshipmen are underrepresented severely at  
2 high OOMs and overrepresented severely at low OOMs. Those are  
3 the orange bars, correct?

4 A. The orange bars are the African Americans, yes.

5 Q. And the conclusion here, reading the data, is,  
6 specifically, about .1 percent of the midshipmen ranked in the  
7 top OOM values were Black, African American.

8 And then down below, while Black, African American  
9 midshipmen make up roughly 7 percent of the entire brigade,  
10 they make up about 26 percent and 35 percent of those  
11 midshipmen having an OOM within the intervals 1,001 to 1100 to  
12 1200 respectively.

13 Do you see that?

14 A. Yes, sir.

15 Q. And you don't have any reason to doubt that data; do you?

16 A. No. I don't know the derivation of data, but I have no  
17 reason to doubt it. I'm sure it's correct.

18 Q. And based on what you told me earlier, it stands to reason  
19 that Black midshipmen, at the bottom of the class, will have a  
20 great difficulty commissioning into the submarine community  
21 because they use OOM as a priority, right?

22 A. We have Black midshipmen that commission in the submarine  
23 community, but not a whole lot. Correct.

24 Q. And that could be in part because of the clustering you  
25 see at the low OOM --



1 A. It's likely due to their academic transcripts.

2 MR. MORTARA: No more questions, Your Honor.

3 THE COURT: Thank you, Mr. Mortara.

4 Mr. Mendez, cross-examination.

5 And just for the record, this witness has essentially been  
6 called by both sides, so . . . .

7 CROSS EXAMINATION

8 BY MR. MENDEZ:

9 Q. Good afternoon, Captain Vahsen.

10 A. Hi.

11 Q. I just want to briefly touch upon your background.

12 At a general level, can you describe your career as a Navy  
13 officer.

14 A. Sir, I served 30 years in the Navy. The first 20, I  
15 would -- not that there's anything traditional, but a normal  
16 aviation background, served in several squadrons. I served  
17 aboard a ship, culminating in a command of a squadron. And  
18 then my last 10 years was a little nontraditional. I spent  
19 five years serving in the Navy's Office of Legislative Affairs  
20 and then the final five years as a chief of staff to the  
21 superintendent.

22 Q. When did you retire from active duty service in the Navy?

23 A. In 2015.

24 Q. Have you been deployed before?

25 A. Yes, sir.

1 Q. How many times have you been deployed?

2 A. Nine.

3 Q. Where have you been deployed?

4 A. Pretty much all over the world. Western Pacific,  
5 Middle East several times, Mediterranean, and in -- in and  
6 around South America and the Caribbean Sea.

7 Q. Have you seen combat before?

8 A. Yes, sir.

9 Q. How many times have you seen combat?

10 A. During four of those deployments, I was either shot at or  
11 served in combat zones, yes.

12 Q. Where have you seen combat?

13 A. In the region around Serbia, and mostly in Afghanistan and  
14 Iraq.

15 Q. I want to turn to performance.

16 At a general level, what are -- what are the reasons why  
17 midshipmen might not graduate from the Naval Academy?

18 A. They're separated for a variety of reasons. Voluntary.  
19 They could have a medical issue that does not allow them to be  
20 commissioned. It could be academic attrition. It could be  
21 conduct attrition; they do something egregiously wrong or have  
22 a habit of not following the rules. It could be honor  
23 violations.

24 And then it could not meet the physical readiness. We  
25 give them tests, and they have to learn how to swim and things

1 like that.

2 And finally, aptitude, which is typically a very small  
3 percentage of individuals that don't measure up, we don't think  
4 should be officers.

5 Q. Is academics the most frequent reason why a midshipman  
6 might not graduate from the Naval Academy?

7 A. No, sir. It's one of those smaller reasons.

8 Q. And approximately what percentage of midshipmen of a given  
9 class separate because of academics?

10 A. Of the late, it's been typically right around 1 to  
11 1-and-a-half percent.

12 Q. And what is generally the most frequent reason why  
13 midshipmen would leave the Naval Academy before graduating?

14 A. The majority of midshipmen typically leave for voluntary  
15 reasons; 50 or 60 percent or so do.

16 Q. Approximately what percentage of midshipmen in a given  
17 class separate for voluntary reasons?

18 A. About 50 to 60 percent.

19 Q. What percentage of the class?

20 A. Oh, I'm sorry.

21 Q. The overall class.

22 A. It's roughly 5 to 6 percent of the class.

23 Q. And is voluntary attrition the same as academic attrition?

24 A. No, sir.

25 Q. If a midshipmen leaves for voluntary reasons, does that

1 mean that he or she was unable to academically perform at the  
2 Naval Academy?

3 A. No, sir.

4 Q. Is academics the most frequent reason why African American  
5 midshipmen leave the Naval Academy before graduating?

6 A. No.

7 Q. And could you explain -- we've -- my friend on the other  
8 side discussed a bit about athletes and attrition of athletes.

9 So for the record, could you explain what a varsity  
10 athlete is at the Naval Academy.

11 A. So a varsity athlete is a midshipmen -- all our midshipmen  
12 are students athletes but a varsity athlete is one that  
13 competes in one of our 36 intercollegiate varsity sports.

14 Q. What percentage of a given class contains varsity  
15 athletes, on average?

16 A. It's usually 30 to 33 percent. About 30 percent.

17 Q. And could you explain for the record what a recruited  
18 athlete is.

19 A. So a subset of that, those are -- when they were  
20 midshipmen candidates, before they had been reached out or they  
21 contacted a coach, a coach found interest in recruiting them.  
22 So they'd be a subset. You know, we do have some folks that  
23 walk on to sports once they're here. It's becoming less and  
24 less popular or less and less frequent, but those are folks  
25 that we had an idea they might play on our varsity sports

1 before they came here.

2 Q. And what percentage typically of a given class are  
3 recruited athletes?

4 A. They're the majority of the athletes, so I'd say probably  
5 25 to 30 percent.

6 Q. And prior to the COVID-19 pandemic, did African American  
7 athletes represent a substantial portion of African American  
8 attrition?

9 A. Yes, sir.

10 Q. Before the COVID-19 pandemic, what was the most frequent  
11 reason why African American athletes would leave the Naval  
12 Academy before graduating?

13 A. Voluntary attrition.

14 Q. And I think there's another category that my friend on the  
15 other side briefly touched upon with you and I wanted to flush  
16 out a little bit more, and that's blue-chip athletes.

17 Could you explain for the record what a blue-chip athlete  
18 is.

19 A. So a blue-chip athlete is normally an athlete that a coach  
20 really wants and the athletic direct really wants. They tend  
21 to not be able to get in on their own academic record. You  
22 know, academics is one of those things that is considered in  
23 the admissions process, and they're usually a little bit --  
24 while we think they can certainly get through the program, they  
25 may not compete academically with some other folks, and so we

1 give them special consideration due to their athletic  
2 background.

3 Q. Do blue-chip athletes represent a substantial portion of  
4 the individuals that are in NAPS at a certain -- at any given  
5 point?

6 A. That are at NAPS?

7 Q. Yes.

8 A. Yes, sir.

9 Q. And what percentage of a given class at the Naval Academy  
10 are blue-chip athletes?

11 A. We typically cap that at 20 percent of the class.

12 Q. Do African American midshipmen constitute a  
13 disproportionate number of blue-chip athletes for any varsity  
14 sports at the Naval Academy?

15 A. Yes.

16 Q. Which sports?

17 A. I would say football and basketball, men's and women's  
18 basketball.

19 Q. And how do blue-chip athletes at the Naval Academy perform  
20 in terms of their academics compared to midshipmen that are not  
21 blue-chip athletes?

22 A. Not as well.

23 Q. And why is that?

24 A. Along with taking some significant risk, typically just  
25 coming in the front door with their academic prowess. And then

1 on top of that, they -- especially in sports like football and  
2 basketball, they spend a lot of their waking day committed to  
3 that sport. An average midshipmen spends a lot more time in  
4 the books and in the company area, where they're seen quite a  
5 bit.

6 And then they're on the road quite a bit, so they miss  
7 some classes and whatnot, yeah.

8 Q. So putting aside academics, are there ways in which  
9 blue-chip athletes perform better than midshipmen that are not  
10 blue-chip athletes at the Naval Academy?

11 A. They typically are better athletically, and that's  
12 something that we look at. We want fit and athletic.

13 They have a little bit more grit often, a little bit more  
14 resilience often; something we look for both in midshipmen and  
15 junior officers. They understand the concept of teamwork and  
16 putting a team before themselves. And quite often, they have  
17 some leadership capabilities that they developed over the years  
18 before they've come here and then they've honed while they're  
19 here.

20 And not that you can say every single athlete, blue-chip  
21 athlete is going to be better in those things, but they tend to  
22 be very strong in those areas.

23 Q. Are those qualities that you just mentioned, are those  
24 important to the Naval Academy?

25 A. Yes, sir.

1 Q. Why are those qualities important to the Naval Academy?

2 A. I'd say we want physically fit folks for any service  
3 assignment. You know, they're an example out there, in front  
4 of their troops. But most specifically, when you look at the  
5 Marine Corps, the SEAL community, the Explosive Ordnance  
6 Disposal community, those are very taxing, physically demanding  
7 things. So that's one thing.

8 The resilience and the grit is important for our junior  
9 officers. That's something we're trying to instill within the  
10 Academy. The military is a team sport. And that innate  
11 teamwork and putting team before self is important. The  
12 leadership -- we're all about developing leaders. And I think,  
13 you know, we often talk about winning. And winning is  
14 important in sports. It's very important in defense of our  
15 nation.

16 Q. Do African American blue-chip athletes tend to have those  
17 qualities that you just described?

18 A. Yes, sir.

19 Q. Now I want to turn to Plaintiff's Exhibit 34, which has  
20 been admitted into evidence.

21 Captain Vahsen, do you recognize this document?

22 A. Yes, sir.

23 Q. Can you describe what this document is?

24 A. This is a document from the Academy Effectiveness Board.  
25 I'm a member of the board. That's a group that looks at and



1 assesses annually how we're doing as an institution. And this  
2 is an assessment for academic year 2022/'23.

3 Q. I want to turn to the fifth bullet point on the first  
4 page, Section 1A. And I'm reading. I'm looking at where it  
5 says that, "The decrease in the class of 2023's graduation rate  
6 was primarily attributable to a substantial increase in  
7 voluntarily attrition."

8 Do you see that?

9 A. Yes, sir.

10 Q. And do you see where it next says, "Increases in academic  
11 and conduct/honor attrition contributed to a lesser extent"?

12 A. Yes, sir.

13 Q. And do you see the last line in that bullet point, which  
14 states that, "The class of 2023's journey through the COVID-19  
15 pandemic likely played a major role in the doubling of  
16 voluntary attrition from the prior class"?

17 A. Yes, sir.

18 Q. How did the COVID-19 pandemic contribute to the rise in  
19 voluntary attrition?

20 A. The class of 2023 came in during -- during COVID. And  
21 it's -- Academy is hard. And usually -- I mean, we made it  
22 harder with COVID. They were not allowed to leave campus.  
23 They were often quarantined to their rooms. A lot of teaching  
24 was online.

25 And I would offer, most importantly, they did not get the

1 normal summer training that most midshipmen do, and that's  
2 where they go out and see the fleet, they see the Marine Corps,  
3 they see ships, submarines, aviation squadrons; why many of  
4 them came and the primary reason. So they don't get what we  
5 call the "why." They don't get to reinforce the "why."  
6 They're just in the grind.

7 It was just a tough time. And I think at that age,  
8 sometimes everybody thinks the grass is always greener on the  
9 other side, and so a lot of them left for voluntary reasons.

10 Q. I want to turn to the next page, this is the second bullet  
11 point on Page 2 of this document.

12 And I'm looking at the bullet point that says, "The class  
13 of 2023's varsity athletes lost sizable portions of their  
14 competitive seasons during their first two years at the  
15 Academy."

16 Do you see that?

17 A. Yes, sir.

18 Q. How did the loss of competitive seasons contribute to  
19 attrition?

20 A. I would offer that our young folks that come to the  
21 Academy to be midshipmen come for a variety of reasons. Many  
22 of our varsity athletes, one of the primary reasons is to  
23 participate in Division I sports; it's really important to  
24 them. And so they're going through the grind of midshipman  
25 life, kind of extra grind that I just said. They don't even

1 get to leave the campus. And they're not getting to do their  
2 specific "why." They're not getting to compete in varsity  
3 sports. So that was a little frustrating for many of them, to  
4 have the grind and not be able to do that. So the COVID was a  
5 big portion there.

6 At the same time, we also had -- the next sentence there,  
7 the opening of the transfer portal and NIL played a -- played a  
8 role as well for our varsity athletes.

9 Q. Let's break that down. How the transfer portal play a  
10 role in the voluntary attrition of varsity athletes?

11 A. Prior to this time frame, for a varsity athlete out of  
12 college or university to which schools, whether it be the Naval  
13 Academy or some other school, if they were to switch schools,  
14 they would not be able to participate at that new school for at  
15 least a year. That's a huge dissuader. And that tended to  
16 stop people from switching schools.

17 At this time, the transfer portal was changed such that  
18 you could leave one school and immediately go to another school  
19 and start playing again. So that barrier to moving was  
20 removed, and so that certainly, we think, had a role in losing,  
21 during this time, quite a few of our football players.

22 Q. And how did NIL contribute to voluntary attrition?

23 A. Name, image and likeness allows athletes to be paid. As  
24 DoD employees that already have a job as a midshipmen, our  
25 midshipmen are not allowed to receive any NIL payments. So

1 perhaps that was a carrot that they thought they couldn't have,  
2 and that could have been a factor in having folks leave as  
3 well.

4 Q. All right. Now let's turn to Plaintiff's Exhibit 164,  
5 which also has been admitted into evidence.

6 Captain Vahsen, do you recognize this document?

7 A. Yes, sir. That's an email from myself to one of the  
8 associate directors of athletics.

9 Q. Do you see in your email, which is towards the middle of  
10 the page, do you see where you write that, "For the class of  
11 2023, attrition for African Americans is already over  
12 36 percent with a year to go"?

13 A. Yes, sir.

14 Q. And do you see where you write, in the next sentence, "In  
15 peeling back the onion, I've discovered that the football alone  
16 accounts for 55 percent of that attrition. And of the 17  
17 African American football players that have been separated, 11  
18 were for voluntary reasons" -- and in parentheses -- "(other  
19 six were split evenly between honor violations and academic  
20 separation)."

21 Do you see that?

22 A. Yes, sir.

23 Q. And do you see where you next note that "COVID certainly  
24 played a role"?

25 Do you see that?

1 A. Yes, sir.

2 Q. And what precise role did COVID play in the attrition of  
3 African American football players from the Naval Academy?

4 A. I think, especially for this group, this happened during  
5 their freshman and sophomore years, they couldn't play very  
6 much at all. Their seasons were truncated. Their spring  
7 seasons were truncated as well.

8 And again, as I alluded to, a lot of them come here and  
9 that's their primary reason when they initially come to the  
10 Naval Academy. So they were in that grind and not being able  
11 to play, not being able to have the good part of -- you know, I  
12 was a varsity athlete at the Academy. That's your sanctuary.  
13 And they didn't have that. They couldn't go out there and do  
14 that and compete on a regular basis.

15 I'd also offer that for many of these folks, they are  
16 blue-chip athletes already struggling with academics at times,  
17 and the fact that we were doing a lot of online classwork, it's  
18 just harder. So that might have contributed to the increase in  
19 academic separations.

20 Q. Approximately how many midshipmen, overall, are there in a  
21 given class in a year?

22 A. About 1,200.

23 Q. And approximately -- at a general level, approximately how  
24 many are African American of that total?

25 A. It's usually a little over 6 percent. So probably 70, 75.

1 Q. Okay. Now turning back to this same document, Plaintiff's  
2 Exhibit 164. Do you see the chart at the end of the page that  
3 lists a total of 50 African American varsity athletes for the  
4 class of 2023?

5 A. Yes, sir.

6 Q. Do you see where it notes that 21 African American  
7 athletes of that total separated from the Naval Academy?

8 A. Yes, sir.

9 Q. And do you see where it says that 17 African American  
10 football players separated from the Naval Academy?

11 A. Yes, sir.

12 MR. MENDEZ: Now let's put up Plaintiff's Exhibit 148.

13 BY MR. MENDEZ:

14 Q. And do you recall discussing this document and the  
15 attached study with plaintiff's counsel?

16 A. Yes, sir.

17 Q. I want to turn to Page 2 of the document.

18 Do you see where -- do you see the list of authors that is  
19 underneath the title?

20 A. Yes, sir.

21 Q. Are you an author of this document?

22 A. I am not.

23 Q. Did you edit this document?

24 A. No, sir.

25 Q. Did you provide suggestions to the content of this

1 document?

2 A. No, sir.

3 Q. Did you examine the underlying data in this document?

4 A. No, sir.

5 MR. MENDEZ: No further questions.

6 THE COURT: Thank you, Mr. Mendez.

7 Any redirect, Mr. Mortara?

8 MR. MORTARA: Yes, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. MORTARA:

11 Q. Captain Vahsen, on behalf of all Students for Fair  
12 Admissions, we would like to thank you for your service to this  
13 country.

14 A. It's a privilege.

15 THE COURT: Thank you, Mr. Mortara.

16 And Captain Vahsen, thank you very much. You're excused.  
17 And you shouldn't discuss your testimony with anyone in the  
18 event -- until this trial is over at the end of next week, in  
19 the event you're called back to the witness stand.

20 THE WITNESS: Thank you, Your Honor.

21 THE COURT: Thank you very much. And thank you very  
22 much for your military service. Nice to have you. Thank you.

23 Okay. With that, I understand that the next witness will  
24 be -- is a defendant's expert witness only listed by the  
25 plaintiff -- by the defendants as a witness, and that's

1 Beth Bailey.

2 MS. GARGEYA: That's correct, Your Honor.

3 THE COURT: Ms. Gargeya, nice to see you.

4 MS. GARGEYA: Thank you, Your Honor.

5 THE COURT: You're calling that witness? Yes. Okay.

6 Thank you.

7 MR. MORTARA: Your Honor, we're going to make a move  
8 at our table because our newest team member, Ms. Wyrick, whose  
9 trial name is "War Eagle" because she went to Auburn, is going  
10 to take her place at the table, if that's okay.

11 THE COURT: Well, that's fine. I think the Auburn,  
12 Alabama game might be the only game that challenges the  
13 Army/Navy in terms of intensity.

14 (Laughter.)

15 THE COURT: Maybe not. There's some others, I guess.  
16 There's some others.

17 Ms. Wyrick, nice to have you as well.

18 Ms. Gargeya will be handling the direct examination.

19 Thank you very much.

20 Dr. Bailey, if you'll come forward here and be sworn.

21 (Witness sworn.)

22 THE CLERK: Please have a seat. Please adjust your  
23 microphone. If you don't mind speaking directly into it,  
24 please state and spell your first and last name for the record.

25 THE WITNESS: Beth Bailey; B-E-T-H, B-A-I-L-E-Y.



1           **THE CLERK:** Thank you.

2                           **DIRECT EXAMINATION**

3 **BY MS. GARGEYA:**

4 **Q.** Good afternoon, Professor Bailey.

5 **A.** Good afternoon.

6 **Q.** What is your current position and title?

7 **A.** I'm a foundation-distinguished professor at the University  
8 of Kansas and director of the Center for Military, War, and  
9 Society Studies.

10 **Q.** How long have you been a foundation-distinguished  
11 professor at the University of Kansas?

12 **A.** I'm beginning my 10th year now.

13 **Q.** What is a foundation-distinguished professorship?

14 **A.** The University of Kansas, in 2014, created a set of 12  
15 distinguished professorships and recruited faculty members from  
16 all disciplines to fill those professorships. So there are 12  
17 of us for the university.

18 **Q.** Understood.

19       What is your academic focus?

20 **A.** My research and teaching focus is on the U.S. military,  
21 it's on recent American history, and on the history of gender  
22 and sexuality.

23 **Q.** I'd like to talk about your educational background and  
24 prior work experience.

25       Where did you attend college?

1 A. Northwestern University.

2 Q. What degree did you earn there?

3 A. A BA in American culture.

4 Q. After college, did you attend graduate school?

5 A. Yes.

6 Q. Where did you attend graduate school?

7 A. University of Chicago.

8 Q. And what degrees did you earn there?

9 A. MA and Ph.D.

10 Q. In what subject?

11 A. American history.

12 Q. Did you take any courses on American history in the 20th  
13 century?

14 A. Yes.

15 Q. Did you take any courses on historical research?

16 A. Yes.

17 Q. Did you take any courses on historical methodology?

18 A. Yes.

19 Q. Could you please briefly walk us through your employment  
20 history after you graduated from the University of Chicago.

21 A. I received my Ph.D. in 1986. And in the following year, I  
22 taught as a visiting assistant professor at the University of  
23 Hawaii, Manoa. And also taught courses at Chaminade University  
24 and Honolulu Community College.

25 The following year, I moved to the University of Kansas as

1 a visiting assistant professor. I taught there for two years.  
2 And then took a tenured track position at Barnard College,  
3 Columbia University. I held a Fulbright appointment at the  
4 University of Indonesia during that period.

5 And in 1998, I moved to the University of New Mexico.

6 In 2004, I moved to Temple University, spent 11 years  
7 there.

8 And then moved to take my current position as a  
9 distinguished professor at the University of Kansas in 2015.

10 Q. Thank you, Professor Bailey.

11 Have you taught courses on American history?

12 A. Yes, I have.

13 Q. Where?

14 A. In all of the institutions I mentioned.

15 Q. Have you taught courses on military history?

16 A. Yes. Beginning at Barnard, and moving forward.

17 Q. Have you taught courses on historical search and  
18 methodology?

19 A. Yes. At all of the institutions, beginning with Barnard.

20 Q. Professor Bailey, have you received research fellowships  
21 for your work in military history?

22 A. Yes, I have.

23 Q. Which fellowships?

24 A. I received a grant -- well, I received fellowships and  
25 grants through my own institutions. But in terms of highly

1 competitive national and international fellowships and grants,  
2 I received two from the American Council of Learned Societies.  
3 I received two from the National Endowment for the Humanities.  
4 I received a Woodrow Wilson International Center for Scholars  
5 Residential Fellowship. And I was one of 23 people across  
6 multiple fields in the country who received Carnegie Foundation  
7 Fellowship for the years 2021 through 2023.

8 Q. Professor Bailey, have you been affiliated with any  
9 centers or academic institutions outside of the classroom  
10 related to military history?

11 A. Yes, I have.

12 Q. Which ones?

13 A. Well, at Temple University, the Center for the Study of  
14 Force and Diplomacy, of which I served as director for a year.  
15 And then as the founding director of the Center for Military,  
16 War, and Society Studies at the University of Kansas. I also  
17 chair now the Department of the Army Historical Advisory  
18 Subcommittee.

19 Q. What do you do as founding director of the Center for  
20 Military, War, and Society Studies?

21 A. The purpose of the center is to foster research on and  
22 about the U.S. military. And commonly, we hold one to two  
23 international symposia each year on topics related to the U.S.  
24 military, sometimes in conjunction with U.S. military  
25 institutions. And we foster the teaching of U.S. military

1 history as well.

2 Q. Thank you, Dr. Bailey.

3 I believe you mentioned the Department of the Army's  
4 Historical Advisory Subcommittee. Am I getting that right?

5 A. Yes, that's right.

6 Q. How did you join that subcommittee?

7 A. I was invited to join by the U.S. Center of Military  
8 History, and then appointed by the Secretary of the Army.

9 Q. What does that subcommittee do?

10 A. The subcommittee is a group of, at this point, nine  
11 civilian academic historians who provide advice to the  
12 Department of the Army about historical programs within the  
13 Army; that includes professional military education, PME; that  
14 includes public-facing history, including events and museums;  
15 and it's also about the official histories that the U.S.  
16 military, the U.S. Army publishes.

17 Q. How long have you served on that subcommittee?

18 A. This is my seventh year, in total.

19 Q. In what capacities have you served on the subcommittee?

20 A. I spent five years as a member, and this is my second year  
21 as chair.

22 Q. How did you become chair of the subcommittee?

23 A. I was invited to serve as chair by the Center of Military  
24 History, and I was appointed by the Secretary of the Army.

25 Q. What do you do as the chair of that committee?

1 A. I establish the agenda for our meetings. I communicate  
2 with members in the U.S. military about topics we need to  
3 discuss, questions that we need to discuss. And I write the  
4 report that goes on up through the education committee on to  
5 the Department of the Army's office.

6 Q. Have you been asked to speak on military history?

7 A. Yes.

8 Q. By military institutions?

9 A. Yes.

10 Q. Which ones?

11 A. Well, including the Air War College, the U.S. Army War  
12 College, the Command and General Staff College, the combined  
13 Armed Center at Ft. Leavenworth, and as for the TRADOC, the  
14 Training and Doctrine Command professional leadership  
15 conference through the Army.

16 Q. Thank you, Professor Bailey.

17 Have you conducted a historical analysis of the military  
18 before?

19 A. Yes, I have.

20 Q. For which projects?

21 A. A whole host of projects. Of the, I believe, 14 books  
22 that I have either written or edited, co-edited, I'd say eight  
23 focus on the U.S. military. And I've published an estimate of  
24 about 25 articles focusing on the U.S. military.

25 Q. How many of these publications were peer reviewed?

1 A. All of the books and all of the significant articles were  
2 peer reviewed, some appearing in the *Journal of American*  
3 *History*, which is the top journal in the field of U.S. history.

4 Q. In those publications, did you employ a similar  
5 methodology to what you did for your testimony today?

6 A. Yes, I did.

7 Q. Have you received any recognition for your work on  
8 military history?

9 A. Yes.

10 Q. What recognition have you received?

11 A. I was honored to receive the Society of Military History's  
12 top award for military history, the Lifetime Achievement Award,  
13 the Samuel Eliott Morison Award.

14 I was asked to deliver the Marshall Lecture at the  
15 American Historical Association, which is something that is for  
16 significant military historians.

17 I received two distinguished writing awards from the Army  
18 Foundation.

19 I received the distinguished book award for my most recent  
20 book, *An Army of Fire*, from the Society of Military History.

21 And I've received several other major research awards that  
22 were not particularly for military history, but were based on  
23 my military history work.

24 **MS. GARGEYA:** At this time, I move to have  
25 Professor Beth Bailey qualified as expert witness in American

1 military history.

2 **THE COURT:** Any voir dire on this, Ms. Wyrick?

3 **MS. WYRICK:** No, Your Honor.

4 **THE COURT:** All right. No voir dire.

5 Professor Beth Bailey will be accepted as an expert in the  
6 field of American military history, and she can opine and give  
7 her opinions in that regard.

8 Thank you, Professor Bailey. It's nice to have you here.

9 **BY MS. GARGEYA:**

10 **Q.** Professor Bailey, did you prepare an expert report in this  
11 case?

12 **A.** Yes, I did.

13 **Q.** How would you describe the methodology that you used in  
14 preparing your report?

15 **A.** The usual historical methodology that I have used in  
16 writing all of my other historical work is based on decades of  
17 historical research in primary source records from the  
18 historical eras as well as extensive reading in the secondary  
19 literature in the field.

20 **Q.** Professor Bailey, did you look at sources relating to the  
21 United States Navy in preparing your report?

22 **A.** Yes, I did.

23 **Q.** Which ones?

24 **A.** I looked at a series of documents that were generated by  
25 or about the U.S. Navy, often through the Department of



1 Defense.

2 And I relied on work that I had done for the book *An Army*  
3 *of Fire*, which did extensive research in the records from the  
4 Department of Defense and the Defense Race Relations Institute  
5 and the other agencies that were multiservice.

6 Q. Understood.

7 Is the methodology that you have described and the source  
8 review that you've described widely used by other historians?

9 A. Yes. It's standard historical methodology.

10 Q. Did the application of this methodology allow you to reach  
11 certain conclusions in this case?

12 A. Yes.

13 Q. Professor Bailey, you have a binder sitting in front of  
14 you. Please turn to Tab 1.

15 THE COURT: This is Defendant's 196; is that correct,  
16 Ms. Gargeya?

17 MS. GARGEYA: That's correct, Your Honor.

18 THE COURT: All right. Defendant's Exhibit 196 will  
19 be admitted into evidence. And consistent with the earlier  
20 rulings of this Court -- I don't know that there are any  
21 hearsay rules within the ambit of Rule 805 for hearsay within  
22 hearsay or, but if there are, it's been an understanding here  
23 that, as a bench trial, I can certainly ferret those out if  
24 they exist on either side of the aisle as well as under  
25 Rule 807 in terms of significant trustworthiness as to the

1 information.

2 So the exhibit is admitted in its entirety, and you may  
3 proceed.

4 MS. GARGEYA: Thank you, Your Honor.

5 BY MS. GARGEYA:

6 Q. Professor Bailey, have you prepared some demonstrative  
7 exhibits to assist the Court in following your testimony today?

8 A. Yes, I have.

9 MS. GARGEYA: Your Honor, the government moves for  
10 admission of DD2 for demonstrative purposes, and we'll project  
11 that on the screen.

12 THE COURT: That's fine.

13 BY MS. GARGEYA:

14 Q. Professor Bailey, do your demonstratives include a summary  
15 of the opinions you're offering the Court today?

16 A. Yes.

17 Q. Would you please describe your first opinion that you're  
18 offering to the Court.

19 THE COURT: By the way, Counsel, these demonstrative  
20 exhibits on both sides will come into evidence as well, and  
21 we'll make sure at the conclusion of the trial that counsel are  
22 very much involved in making sure we have them all together  
23 because they're part of the record as well in this case.

24 MS. GARGEYA: Thank you, Your Honor.

25 THE COURT: You may continue.

1 BY MS. GARGEYA:

2 Q. Professor Bailey, please explain your first opinion in  
3 this case.

4 A. My first opinion is that racial conflict, segregation, and  
5 discrimination hindered U.S. military readiness and efficiency  
6 in the years before 1967.

7 Q. Please describe the second opinion you're offering to the  
8 Court.

9 A. A racial crisis, often characterized by racial violence,  
10 exploded during the Vietnam era, and U.S. military leaders  
11 attempted to solve the problem of race.

12 Q. And please describe the third opinion that you're offering  
13 to the Court.

14 A. Diversity in the U.S. military aids the military's public  
15 legitimacy.

16 Q. Are you offering any opinions today, Dr. Bailey, on  
17 today's military?

18 A. No.

19 Q. Are you offering any opinions on today's Naval Academy?

20 A. No.

21 Q. Why not?

22 A. I'm here as a historical expert.

23 Q. Understood.

24 Let's dig into your opinions in this case.

25 So we'll start with the first opinion that "racial

1 conflict, segregation, and discrimination hindered U.S.  
2 military readiness and efficiency before 1967."

3 What is your basis for this opinion?

4 A. During World War I, World War II, and on into the Korean  
5 War, the U.S. military diverted time, attention, and resources  
6 in order to maintain segregation and subordination of African  
7 American service members that had an impact on the manpower  
8 needs of the U.S. military, the public legitimacy in the eyes  
9 of the American public, and also on military efficiency.

10 Q. Taking a step back. In World War I and World War II, were  
11 African American service members discriminated against?

12 A. Yes. The U.S. military fought for democracy with a  
13 segregated armed forces, which was a powerful form of  
14 discrimination. And racial discrimination was both official  
15 policy and tolerated everyday experience for African American  
16 service members.

17 Q. Did the racial discrimination you've just described affect  
18 military readiness and efficiency during this period?

19 A. Yes, it very much did. Immediately, in terms of manpower  
20 needs. During World War I, the military resisted using African  
21 American service members altogether. And at the end of the  
22 war, the U.S. Marine Corps had enrolled not a single African  
23 American.

24 During World War II, there was -- the U.S. military turned  
25 to an all-draft function, in most cases, in order to manage

1 manpower across civilian and military needs. And that -- the  
2 Selective Service imposed a cap of 10 percent in terms of  
3 enlistment of African Americans, so denying the military-needed  
4 manpower.

5 That -- the example I'll give here is perhaps a  
6 nontraditional example because we most often think about  
7 combat. But in World War II, because of segregation and the  
8 limits to enrollment of African Americans, despite the dramatic  
9 need for nurses on the part of the U.S. military as American  
10 service members were fighting and dying and being grievously  
11 wounded, the U.S. military denied access to African American  
12 nurses who repeatedly appealed to be admitted to the U.S.  
13 military.

14 In 1942, there were 65 slots in the Army Nurse Corps for  
15 Black nurses; there were none for the Navy. The Navy admitted  
16 its first African American nurse in March of 1945, despite  
17 repeated efforts on the part of Black nurses to service their  
18 nation. The U.S. Army never got above 250.

19 In addition, Black nurses were restricted to only serve in  
20 facilities that had segregated facilities for African Americans  
21 so not to serve like-fighting men who were wounded in battle.

22 That's an example of an extraordinarily poor use of  
23 manpower, when available manpower is there, based on  
24 segregation and subordination of African Americans.

25 **Q.** During World War I and World War II, did racial

1 discrimination in the military result in violence?

2 A. Yes, it did.

3 Q. What type of violence?

4 A. World War I, the most visible example of violence was the  
5 Houston Riot or the Camp Logan Riot in which African Americans,  
6 believing that they were about to be attacked by a White mob,  
7 marched into Houston. There were a significant number of White  
8 casualties and deaths.

9 World War II, though, racial violence was quite  
10 widespread. In the summer of 1943 alone, there were major  
11 outbreaks of racial violence and racial conflict and at least  
12 eight military installations in the United States. That  
13 matters because it's not only the Jim Crow South, but in places  
14 like Kansas, and Pennsylvania and California.

15 There was a race riot that broke out at a naval base in  
16 Virginia because they were offering service members a chance to  
17 go and watch the broadcast of a radio show as entertainment for  
18 them. And they enforced segregation, and that led to a racial  
19 fight which ballooned into a riot.

20 Q. Professor Bailey, did these riots affect the public's  
21 perception of the military?

22 A. Yes. In both World War I and World War II, African  
23 American leaders and members of the public debated how much  
24 loyalty they owed to a nation that denied them the full rights  
25 of citizenship. This was a powerful debate in terms of

1 military service and loyalty to the nation. And when service  
2 members wrote home about discrimination they experienced, when  
3 people attempted to serve their nation and were turned away,  
4 when reports of racial violence were reported in the newspaper,  
5 this had an impact on those conversations.

6 So, for example, looking at the slide here, I've got a  
7 photograph of the aftermath of the Port Chicago explosion in  
8 1944. At Port Chicago, a naval encampment in California,  
9 primarily African American sailors were poorly trained and were  
10 assigned to load explosives onto two ships. Reportedly, they  
11 were being raced by their White officers. The explosion that  
12 ensued killed 320 sailors, most of them Black, and wounded  
13 another 400.

14 And the reports of that certainly had an impact on the  
15 American public. But the fact that a group of Black sailors  
16 refused to go back to work under those same conditions and they  
17 were court-martialed and convicted, that led to a great deal of  
18 frustration and anger on the part of African Americans who saw  
19 members of their community being confined only to serving in  
20 labor battalions and subordinated to -- not being allowed to  
21 serve in the wide range of positions that they might serve and  
22 serve in segregated units.

23 Q. Professor Bailey, when did segregation end in the U.S.  
24 military?

25 A. The process of the end of segregation began in 1948 with

1 the executive order that Harry Truman issued. But it was  
2 somewhat protracted in piecemeal process. There was a fair  
3 amount of resistance on the part of the U.S. military. The  
4 Secretary of the Army pretty much downright refused to  
5 desegregate the military and was relieved of his position.

6 In 1951, the U.S. Marine Corps still had units that it was  
7 designated as Black and White.

8 The U.S. Army, the same thing until 1952.

9 In the Korean War, there were still -- 65 percent of  
10 African Americans were serving in the steward branch.

11 So desegregation was a process and a process that was  
12 contested.

13 In general, historians agree that desegregation had been  
14 accomplished by 1954.

15 Q. So you're saying that racial discrimination continued  
16 after desegregation was ordered?

17 A. Yes.

18 Q. Could you describe racial discrimination in the military  
19 during the Korean War?

20 A. During the Korean War, much of it was the shadow of racist  
21 policies and individual racism that still played a role. The  
22 Army's Center of Military History published an official history  
23 called *Black Soldier, White Army* that looked at the combat  
24 failures of the 24th Regiment and argued that policies that  
25 attempted to prevent any White service members from being



1 commanded by Black officers had created such a set of distrust  
2 and problems with unit cohesion that it had a profound effect  
3 on the way in which they were able to perform in battle.

4 Q. Was the public concerned with discrimination in the  
5 military during this time?

6 A. Yes, very much so. African Americans were concerned, and  
7 people who supported racial integration and equal opportunity  
8 were concerned.

9 I have here, on the screen, a quote from Congressman Adam  
10 Clayton Powell, from New York. He said -- he published this in  
11 *The New York Times* in 1953. He said the United States Navy  
12 offers a, quote, "modernized 20th century form of slavery." He  
13 said, "Intelligent, ambitious Negroes" -- and that was a term  
14 of respect at the time -- "are boycotting the United States  
15 Navy because they are not interested in making the world safe  
16 for democracy by shining shoes, nor are they interested in  
17 fighting communism with frying pans."

18 Q. Given these dynamics, did the U.S. military implement  
19 additional measures to assist with desegregation?

20 A. Yes, they did; often at the instigation of the Department  
21 of Defense and under pressure from the executive branch.

22 Q. Were these measures effective? What types of measures  
23 were they?

24 A. In general, they adopted a set of policies and procedures  
25 that were summed up by a phrase that the Army often used, "I

1 see only one color, and that's OD"; OD for olive drab, Army  
2 green. So they adopted color-blind policies, and they  
3 attempted things like removing racial designations from all of  
4 the many military forms that people have to fill out as a way  
5 to enforce equal opportunity and a color-blind military.

6 Q. And were these measures effective, Professor Bailey?

7 A. Well, I mean, absolutely policies that are meant to try to  
8 enhance equal opportunity and to get rid of the impact of  
9 segregation were positive compared to what had come before.  
10 But as a tactic, they had limits. Color-blind tactics often  
11 defaulted white.

12 So, for example, Black officers who were facing promotion  
13 boards often found that the promotion boards were all White and  
14 that the White members were not familiar with things like the  
15 historically Black colleges and universities they had attended  
16 when they were assessing their record.

17 In their personal life, they often found that the Navy  
18 Exchange or the PX stocked materials that were intended for  
19 White service members and didn't take account the different  
20 cultural needs or desires of members of other ethnicities and  
21 races.

22 So both minor daily life and significant levels of policy  
23 failed often through the color-blind tactic.

24 Q. Thank you, Professor Bailey.

25 Let's move to your second opinion.

1 "A racial crisis, often characterized by racial violence,  
2 exploded during the Vietnam era, and U.S. military leaders  
3 attempted to solve the problem of race."

4 What is your basis for this opinion?

5 A. My basis for this opinion is that racial violence and  
6 racial conflict was pervasive and highly disruptive during the  
7 U.S. war in Vietnam. And military leaders across services got  
8 to the point that many worried that the level of racial  
9 violence and conflict was so extreme that it was threatening  
10 the ability of the U.S. military to fulfill its mission of  
11 national defense.

12 And so military leaders, particularly Navy and Army  
13 leaders, put a great deal of time and attention in trying to  
14 figure out how to manage, how to solve this crisis that they  
15 were confronting, this problem of race.

16 Q. So after the military was desegregated, there was racial  
17 violence?

18 A. Yes, there was.

19 Q. Could you describe the scope of that violence.

20 A. So in the late '50s through the 1960s, many military  
21 leaders believed that the violence that was existing in  
22 civilian society was not going to profoundly affect the U.S.  
23 military, that it would continue just at low levels.

24 So many were surprised, in the late 1960s, when violence  
25 exploded within the U.S. military, especially in the months

1 following the assassination of Dr. Martin Luther King.

2 Racial violence was characterized by a member of  
3 General Westmoreland's and the chief of staff at the Army, a  
4 member of his staff, as a war. It broke out in barracks and  
5 bars. It was thousands of confrontations, both large and  
6 small. It was within the United States military institutions,  
7 but also throughout the world, from fire bases in Vietnam to  
8 places in the rear, to West Germany, South Korea, Okinawa,  
9 Thailand. It existed worldwide.

10 Q. Professor Bailey, did you review the trial transcript from  
11 yesterday?

12 A. Only the portion that referred directly to my report.

13 Q. And you're talking about the testimony offered by  
14 Colonel Wood?

15 A. Yes, I am.

16 MS. GARGEYA: Noah, could you please show Page 220 of  
17 yesterday's transcript. And could you zoom in on Lines 6  
18 through 21. Thank you.

19 BY MS. GARGEYA:

20 Q. Professor Bailey, yesterday Plaintiff's expert,  
21 Colonel Dakota Wood, stated that violence among service members  
22 during the Vietnam War was a function of larger violence in  
23 society.

24 What's your reaction?

25 A. I have the greatest respect for his military service, but

1 he is not a historian, and he has not done historical research  
2 or extensive reading in this literature. Certainly, external  
3 factors played a significant role in fostering racial conflict  
4 within the U.S. military. Military leaders at the time,  
5 sometimes in a somewhat self-serving fashion, tended to  
6 emphasize that external factors. African American servicemen,  
7 young, Black servicemen came into the military often with a  
8 heightened sense of Black identity and Black pride, and they  
9 were often not willing to accept the treatment that their  
10 fathers and grandfathers had endured. Military leaders at the  
11 time said that.

12 But the fact that that was a concern suggests that they  
13 also understood that a lot of the problem was internal. A lot  
14 of problem were policies and practices, both official and  
15 unofficial, within the U.S. military, and they put a great deal  
16 of effort and attention into trying to figure out how to solve  
17 those internal problems of racial violence, discrimination.

18 Q. And what were some of those internal military problems?

19 A. One that appears most frequently in the historical record  
20 is that the U.S. military appeared to many young, Black  
21 enlisted members as White, as White-dominated as a White  
22 authority. Instances of seeing the Confederate flag flying at  
23 U.S. military installations, instances of racial graffiti in  
24 latrines. I mean, and obviously, people in civilian society  
25 encountered some of those issues as well. It's not something

1 that's restricted solely to the U.S. military.

2 But in the military, that's under control. First of all,  
3 the soldiers, sailors, et cetera, are living within the  
4 military 24 hours a day; they don't escape it. But secondly,  
5 the commander has control over whether or not a Confederate  
6 flag is flying under his command. Military leaders are  
7 responsible for what happens in their command. So it was not  
8 unreasonable for service members to see even things that seem  
9 like unofficial racism as something that is condoned through  
10 the institution of the U.S. military.

11 Q. Thank you.

12 Professor Bailey, to what extent did the draft affect  
13 racial tensions during the Vietnam War?

14 A. Absolutely the draft played a role in racial tensions. I  
15 mean, historians never think of historical events as  
16 mono-causal. There are always multiple factors that affect  
17 the -- in this case, the incidents of racial tension.

18 But what's important to recognize is that some of the  
19 places that there was the most racial violence was not where  
20 people were primarily drafted. West Germany, which is where  
21 people volunteered into the military to go in order not to be  
22 sent to Vietnam, was the place that experienced the most racial  
23 conflict and racial violence.

24 So the draft contributed, but it certainly was not the  
25 primary or the sole factor.

1 Q. You talked a little bit about West Germany.

2 Could you discuss other specific episodes of racial  
3 violence in the Vietnam era.

4 A. Yes. The event that began national and, particularly,  
5 congressional attention to the racial violence during the  
6 Vietnam era was a racial riot at Camp Lejeune, the Marine Corps  
7 Camp Lejeune.

8 In July of 1969, a group of about 40 African American and  
9 Puerto Rican service members started attacking random White  
10 fellow Marines with sticks and broom handles. And one White  
11 corporal who had been wounded three times in Vietnam was  
12 surrounded by a group of fellow Marines while he was lying  
13 prone, kicked repeatedly, and died a week later of massive head  
14 injuries.

15 This event sparked an investigation on the part of  
16 Congress into racial violence and racial conflict within the  
17 U.S. military, which concluded that the events at Camp Lejeune  
18 were not restricted to the Marine Corps.

19 MS. GARGEYA: Your Honor, I recognize it's a little  
20 past 1:00. Would you like me to keep going, or would you like  
21 to break for lunch?

22 THE COURT: This might be a good time to stop. We'll  
23 stop for a one-hour break. It's ten after 1:00. We'll take  
24 our lunch break. We'll start again at 10 minutes after 2:00.

25 Professor Bailey, you shouldn't discuss your testimony

1 with anyone while you're on the witness stand. So I usually  
2 recommend to the witnesses have lunch by yourself. It's the  
3 best way to do it.

4 So with that, this Court stands in recess for one hour  
5 until 10 minutes after 2:00.

6 **THE CLERK:** All rise. This Honorable Court is now in  
7 recess.

8 (A recess was taken from 1:08 p.m. to 2:16 p.m.)

9 **THE CLERK:** All rise. This Honorable Court now  
10 resumes in session.

11 **THE COURT:** Good afternoon, everyone. Be seated.

12 Ms. Gargeya, you may continue your examination of  
13 Dr. Bailey.

14 **MS. GARGEYA:** Thank you, Your Honor.

15 **BY MS. GARGEYA:**

16 **Q.** Professor Bailey, welcome back.

17 **A.** Thank you.

18 **Q.** We had just talked about specific episodes of racial  
19 violence; the Vietnam War; you were talking about Camp Lejeune.

20 Are there other examples of racial riots during this time  
21 period?

22 **A.** Yes, there were. The outbreaks of racial violence began  
23 primarily with the forces that were fighting the ground war in  
24 Vietnam; so the U.S. Marine Corps and the U.S. Army. But they  
25 fairly quickly spread to the other services.



1 I'll point back from Camp Lejeune to a 1968 explosion of  
2 racial violence at Long Binh Jail, which was on the post  
3 outside of Saigon -- at that point, in 1968, a group of Black  
4 inmates attacked fellow guards and prisoners and took control  
5 over a portion of the stockade. You can see, on the slide  
6 here, the aftermath of that riot in which these inmates burned  
7 a portion of the stockade. They held control of the stockade  
8 for weeks, and left the commandant of the stockade with  
9 permanent brain damage.

10 Travis Air Force Base was the first major outbreak of  
11 racial violence for the Air Force. It escalated from a  
12 conflict over how loud to play a record player, and it left a  
13 major racial fight in its wake.

14 At that point, naval leadership said that they had to  
15 believe that there was no way that the racial violence wasn't  
16 going to spread to the Navy as well. It was going to affect  
17 all military installations in the United States and beyond.

18 So the Navy then, the following year, 1972, confronted  
19 violence in the USS Kitty Hawk, very shortly thereafter on the  
20 USS Hassayampa, and then in discipline and narrowly-averted  
21 violence on the Saratoga and the Constellation.

22 **Q.** We just talked about the uprising at Long Binh Jail.

23 Were there additional episodes of violence overseas?

24 **A.** Yes. In fact, it was overseas violence that often  
25 provoked the most concern, and not simply in Vietnam.

1 In West Germany, there was concern that racial violence  
2 that spilled into the streets of the West German towns and  
3 cities was having an impact on the security of the world.

4 In 1971, there were multiple episodes of profound racial  
5 violence; one including when a group of Black service members  
6 attacked the Stuttgart police station and fought German police  
7 for five hours with broken bottles and knives.

8 The Chancellor Schmidt of Germany met with the commander  
9 of the Supreme Allied Headquarters and said that he feared that  
10 the behavior of U.S. service members was endangering the  
11 relationships between the United States and West Germany,  
12 called upon them to gain control over their service members,  
13 and then went on television three times to appeal to the German  
14 public to have more toleration for American service members and  
15 their behavior.

16 It also erupted in South Korea at a point when South Korea  
17 was completely concerned about the continuing depth of its  
18 relationship with the United States. After an episode in which  
19 U.S. service members faced off against about a thousand Korean  
20 nationals after a confrontation, the U.S. -- the U.S. Foreign  
21 Affairs Committee blocked \$50 million in military aid to  
22 South Korea until South Korea could treat U.S. military members  
23 better, in a paraphrase of their words. And South Korea  
24 convened a Blue House, parallel to the White House, committee  
25 to try to mend relationships between the U.S. and South Korea

centered on the military conflict, most of which was racial.

**Q.** Professor Bailey, you just mentioned the House of Foreign Affairs Committee and you discussed the House Armed Services Committee when you were talking about Camp Lejeune.

Did other parts of Congress respond to this widespread violence?

**A.** Absolutely. It was frequently responded to by Congress.

So the Congressional Black Caucus held hearings in 1972 about racism in the U.S. military in general. After the outbreaks of violence that took place on U.S. naval vessels, there was a committee formed in Congress to investigate and discipline the U.S. Navy problems and discipline in the U.S. Navy.

Many of the hearings that I have looked at in the 1970s about the U.S. military, whether the topic is race or not, mentioned the problem of racial violence and racial crisis. It was something that Congress was very concerned about.

**Q.** What did the military do to document this racial violence at the time?

**A.** Well, you can see here, on the slide, I have a picture of crimes of violence by race in July '70 to May 1931 [sic] coming from an unspecified unit in South Vietnam, the U.S. Army Vietnam. This kind of recording was mandated widely. The Department of Justice and then also the various military departments required that units at various levels gather

1 information about racial conflict and racial violence to submit  
2 to them.

3 As an aside, it's kind of a historian's dream because it's  
4 so incredibly well-documented, but it also shows the extent of  
5 concern on the part of the military leaders and the Department  
6 of Defense about the extent of military violence and their  
7 attempts to calibrate and gather data about that issue.

8 Q. Thanks, Professor Bailey.

9 What did the military do to address racial violence during  
10 the Vietnam era?

11 A. The military, feeling like this was a crisis of almost  
12 existential proportions, valued almost any suggestion that  
13 someone could come forward with that seemed to bear some  
14 promise of working.

15 But, by and large, they heavily emphasized the importance  
16 of leadership. There was a strong sense that almost all of the  
17 attempts to handle racial violence were tied together with an  
18 emphasis on leadership as some element of that set of actions.

19 Q. You mentioned leadership.

20 Did the military fire any of its leaders at this point?

21 A. Yes. The civil rights office in the Pentagon announced  
22 publicly that 10 to 12 senior military officers -- they didn't  
23 specify which service -- had been relieved of command because  
24 they were failing to adequately manage racial problems within  
25 their commands.

1 A spokesperson from the Pentagon said that understanding  
2 race relations is a leadership requirement. If you don't  
3 understand, if you can't understand race relations, you can't  
4 be a leader in today's Army; a sentiment that extended to the  
5 other services.

6 Wallace Terry who had been the Saigon Bureau Chief for  
7 *Time* magazine spoke publically when he was being interviewed in  
8 a hearing by the Congressional Black Caucus, and he said -- you  
9 know, there's an old saying in the Navy that "If you run a ship  
10 aground, you're not going to become an admiral." And he said,  
11 "Today, it's not just running a ship aground" -- I'm  
12 paraphrasing obviously, but that -- "if you can't manage race  
13 relations in the Navy, you're not going to become an admiral  
14 either."

15 So there was a wide recognition that leadership in the  
16 military at this point required an ability to address and  
17 manage racial conflict and race relations.

18 Q. Were leaders evaluated on their basis of managing race  
19 relations?

20 A. Yes. So the Office for Efficiency Report, which is a  
21 regular evaluation which really determines the future of an  
22 officer's career, added an item of special interest which was  
23 to evaluate how well the officer in question was managing race  
24 relations and the units under their command.

25 Q. Did the military implement any training programs relating

1 to race relations?

2 A. Yes. That was another early effort. All the services  
3 started doing it on a kind of *ad hoc* basis. The Navy started  
4 its own program in 1971, but the Department of Defense very  
5 quickly decided to take control and standardize that process  
6 and created something called the Defense Race Relations  
7 Institute, which brought together service members and officers  
8 and NCOs from the variety of services to train them in race  
9 relations.

10 The notion was that a lot of the reason there was a  
11 conflict was because there was problem of communication, that  
12 service members didn't really understand the backgrounds, each  
13 other's backgrounds, and being more aware of the diverse  
14 backgrounds in the military would help.

15 But the people who were trained at the Defense Race  
16 Relations Institute were meant to go back to their units and  
17 assist the commanders in race relations and also to teach race  
18 relations courses to the members of the units.

19 Q. Professor Bailey, were the military's leaders also  
20 interested in the makeup of the Officer Corps?

21 A. Very much so. Looking back to the Gesell Committee in  
22 1962 and 1963, the report emphasized the lack of Black officers  
23 and pointed to the Navy as being particularly bad on that  
24 front.

25 And by -- there was constant gathering of information over

1 time, but by the early 1970s, the Department of Defense is  
2 requiring each of the military departments, each of the  
3 services to come up with an affirmative actions plan. And  
4 "actions" was the word, not "action." It involved a variety of  
5 different actions that were positive in terms of trying to  
6 enhance race relations, but central to all of those plans was  
7 an attempt to increase the number of Black officers and visible  
8 Black military leadership.

9 Q. Taking a step back, Dr. Bailey. Was there a dearth of  
10 Black officers at this time?

11 A. Yes, a profound dearth. In 1968, the U.S. Army had one  
12 general officer who was Black out of 520. The Navy had none.  
13 The U.S. Army, in 1968, counted 3.3 percent of its officers as  
14 Black; 0.4 percent of the Navy's officers were Black. So a  
15 dearth of Black officers and a dearth of visible Black  
16 leadership.

17 Q. Why were military leaders concerned about increasing the  
18 number of Black officers?

19 A. Well, multiple reasons. In part, military leaders who had  
20 been thinking hard about how to solve this problem of race and  
21 racial violence believed that the lack of visible Black leaders  
22 contributed to a sense of alienation and anger on the part of  
23 the young, Black service members.

24 So the Pentagon created a film to circulate on military  
25 justice in the early 1970s. And what they chose to begin this

1 film with was a vignette where a young, Black sailor said,  
2 "When I look at the White military, I don't believe that, as a  
3 Black man, I will ever receive fair treatment."

4 That's what they chose to begin with, showing that they  
5 thought that this was a significant factor. And then they  
6 moved to a Captain Togo West who would eventually become  
7 Secretary of the Army -- though, of course, he didn't know that  
8 at the time -- who said, "Might I extrapolate from this?  
9 You're saying, I think, that if you look at the U.S. Navy, the  
10 U.S. Army, the U.S. Marine Corps, the U.S. Air Force and you  
11 see a White-administered, White-dominated set of authorities,  
12 you don't believe that you, as a Black man, will ever receive  
13 fair treatment?"

14 That's what the Department of Defense chose to foreground  
15 in their attempt to understand what was going on that was  
16 provoking the racial violence and the racial crisis in the  
17 military.

18 Secondly, they were concerned about the sense of public  
19 legitimacy. The press, the Black-focused press, but the press,  
20 in general in the United States, tended to use the relative  
21 dearth and the extraordinary dearth in the '60s of Black  
22 officers as shorthand to suggest that the U.S. military was  
23 hypocritical, to suggest that the U.S. military, for all its  
24 talk of attempting to create equal opportunity, actually was  
25 not committed to doing so.



1 And military leaders were particularly concerned at the  
2 end of the Vietnam War because the United States was about to  
3 move to all-volunteer force. And going to an all-volunteer  
4 force, which was requiring people to volunteer -- and they were  
5 going to need 20 to 30,000 people to sign up a month in the  
6 enlisted ranks -- having further alienated a portion of the  
7 American public was not going to be a good start.

8 So they were concerned about the causes of racial  
9 violence, and they were also concerned about the perceived  
10 legitimacy of the U.S. military and part of the American  
11 public.

12 Q. Professor Bailey, why was there such a shortage of Black  
13 officers if military leaders had been concerned about this  
14 problem since 1962 with the Gessel Committee?

15 A. The U.S. military is in a completely unique situation when  
16 it comes to leadership. When they seek to increase the number  
17 of Black leaders, they can't poach from corporate America.  
18 They can't go into the civilian government offices and draw  
19 over people who have become accomplished leaders in that  
20 sphere. They have to grow their own. And to grow an 06 can  
21 take 20 years.

22 So, at this point, in 1968 and the early 1970s, when there  
23 is a dramatic dearth of senior Black leadership, it's, in many  
24 ways, because of decisions that were made 10, 20 years before,  
25 and there's nothing direct that they can do about it at that

1 point. But they realized that it was a problem they had to  
2 confront.

3 Q. So what did the military do to increase the number of  
4 Black officers?

5 A. Well, what they could do was, in some ways, limited. They  
6 couldn't do a lateral hire, so the only place they could focus  
7 was on increasing the number of junior officers coming into the  
8 military. And those numbers were low in 1968. Despite the  
9 fact that the U.S. military had been segregated for a while,  
10 despite equal opportunity programs, they were still struggling  
11 to find African Americans who were entering the military  
12 services.

13 So they tried a bunch of things. They tried to create new  
14 ROTC programs at historically Black colleges and universities.  
15 They attempted to draw Black students into ROTC and  
16 universities.

17 And they focused heavily on the military Academies, trying  
18 to make clear to African Americans who might seek nomination to  
19 the military Academies that they would be welcome, which was in  
20 contradiction to the experiences that many Black cadets and  
21 midshipmen had had in the past. And also to try and increase  
22 the pool of people who might be potential nominees and succeed  
23 by preparatory programs.

24 Q. During the Vietnam era, did the military's reforms aimed  
25 at managing the racial crisis make a difference?

1 A. Yes, they definitely made a difference.

2 There were significant reforms in leadership, in training  
3 and education, in military justice, and in efforts to increase  
4 the number of Black leaders at all levels and all ranks.

5 Q. And since these reforms were implemented, has there been a  
6 major violent racial conflict in the United States military?

7 A. It took a while for full implementation. And my research  
8 on a book about how the U.S. Army moved -- and this was the  
9 Army focus here -- moved to an all-volunteer force, looking at  
10 material on the U.S. military in general, I found some  
11 persistence of racial conflict but no major racial riots and --  
12 and ending in the 1970s. I have no evidence of major racial  
13 riots after that either.

14 Q. Understood.

15 Let's turn to your third opinion, that "Diversity in the  
16 military aids the military's public legitimacy."

17 Professor Bailey, what's the basis for this opinion?

18 A. Well, military leaders that I have studied in this period  
19 believed that the lack of visible Black leadership fostered a  
20 sense of alienation and frustration and anger on the part of  
21 young, Black service members and decreased the legitimacy of  
22 the military in the eyes of some portion of the American public  
23 and conversely believed that increased diversity aids the  
24 military's public legitimacy.

25 I have here some headlines that I took from newspapers and

1 magazines from the era. There's one here from the *Baltimore*  
2 *Afro-American*, since we're in Baltimore, which show the ways in  
3 which the press was reporting instances of racism or perceived  
4 racism in the U.S. military during this time.

5 "As members of the American public, African American  
6 members of the American public discussed whether or not they  
7 owed full loyalty to the U.S. military if they were not being  
8 given full conditions of citizenship."

9 Reporting like that -- this became part of the  
10 conversation, inescapably.

11 Q. So racial conflict in the military affected Americans'  
12 perception of the military?

13 A. Yes. As I said, reporting like this inescapably became  
14 part of the conversation of the legitimacy of the U.S.  
15 military.

16 Q. Professor Bailey, my last question, for now: Did  
17 increasing the diversity of military officers yield benefits  
18 for the U.S. military?

19 A. Yes. Based on my historical research and based on the  
20 opinions of military leaders in the period that I'm studying,  
21 increasing the diversity of military leadership and even  
22 efforts to increase the diversity of leadership that were going  
23 to come to fruition in the future made a difference and served  
24 as a bulwark against what they feared might be practical or  
25 symbolic -- served as the kind of practical and symbolic

1 bulwark against what might be the reemergence of racial  
2 violence and racial tensions within the U.S. military in the  
3 future.

4 **MS. GARGEYA:** No further questions, Your Honor.

5 **THE COURT:** Thank you, Ms. Gargeya.

6 And with that, I'll be glad to hear from you, Ms. Wyrick,  
7 in cross-examination.

8 **CROSS EXAMINATION**

9 **BY MS. WYRICK:**

10 **Q.** Hi, there.

11 **A.** Hi.

12 **Q.** I'm Rachael Wyrick. I represent Students for Fair  
13 Admissions.

14 We've not met before, correct?

15 **A.** No.

16 **Q.** Okay. Before we get started, because I want to get this  
17 right, do you go by Professor Bailey or Dr. Bailey? What do  
18 you prefer?

19 **A.** Usually professor. Either one is fine.

20 **Q.** Great. Thank you. We'll go with that.

21 Professor Bailey, you're a historian, correct?

22 **A.** I am.

23 **Q.** And you went to the University of Chicago for graduate  
24 school; is that right?

25 **A.** I did.

1 Q. And you obtained your Ph.D. in 1986?

2 A. Yes.

3 Q. What was the topic of your dissertation?

4 A. My dissertation was a history of courtship. The title was  
5 "Conventions of a desire; Courtship in 20th Century America."

6 Q. That sounds very interesting. Can you tell me a little  
7 bit more, just in a few sentences, about what that was about.

8 A. I looked at the conventions governing courtship in the  
9 United States from the early 20th century on through -- up to  
10 the sexual revolution.

11 Q. Since you graduated, you've not worked outside of  
12 academia; is that correct?

13 A. No.

14 Q. And you've never served in the military; is that right?

15 A. I have not.

16 Q. Okay. When did you begin studying U.S. military history?

17 A. In 1988, '89. I tend to think in academic years.

18 Q. Understood.

19 And am I right that you did not study U.S. military  
20 history in school; is that accurate?

21 A. I took courses that had to do with war in American society  
22 in my undergraduate career, but not in graduate school, no.

23 Q. You wrote a book titled *An Army of Fire: How the U.S.*  
24 *Army Confronted its Racial Crisis in the Vietnam Era*; is that  
25 right?

1 A. I did.

2 Q. And a second book called *America's Army: Making the*  
3 *All-Volunteer Force*; is that correct?

4 A. Yes.

5 Q. And these two key publications were focused on the U.S.  
6 Army as opposed to, say, the U.S. Navy or the Marines; is that  
7 right?

8 A. Those two books focused on the U.S. Army. It's common for  
9 historians not to take on the entire range of a topic, but to  
10 focus in on a portion of it.

11 Q. Yes. Understood. Thanks.

12 You've testified here today that during the 20th century,  
13 there was overt racial discrimination in the military; is that  
14 correct?

15 A. Yes.

16 Q. And specifically, there was overt racial discrimination in  
17 the military during World War I; is that right?

18 A. Yes.

19 Q. For example, Black soldiers were primarily assigned to  
20 heavy labor and not combat units; is that right?

21 A. That's right.

22 Q. And there was overt racial discrimination in the military  
23 during World War II; is that correct?

24 A. Yes.

25 Q. For example, certain branches refused admission to African

1 Americans because it would require them to build and maintain  
2 segregated facilities; is that right?

3 A. Yes.

4 Q. There were racial prejudices in the military during the  
5 Korean War as well; is that right?

6 A. Yes.

7 Q. For example, there was a perception that African American  
8 troops were difficult to train, and that negatively affected  
9 specific regimens; is that right?

10 A. Yes.

11 Q. Overt racial discrimination in the military that occurred  
12 in the mid-20th century caused anger, frustration, and even  
13 violent responses by enlisted Black service members; is that  
14 right?

15 A. Yes.

16 Q. And the significant racial tensions existed for decades,  
17 both inside and outside of the military; is that correct?

18 A. Yes.

19 Q. There were race riots in the 1940s?

20 A. Yes, there were.

21 Q. In the 1950s?

22 A. Yes, there were.

23 Q. In the 1960s and '70s?

24 A. Yes.

25 Q. There was a system of legal segregation that applied in



1 multiple states through the mid-1960s; is that right?

2 A. Yes.

3 Q. And there was a denial of equal opportunity to African  
4 Americans during that period as well; is that correct?

5 A. Yes.

6 Q. At some point, the military stopped segregating by race;  
7 is that right?

8 A. Yes. Official segregation ended in a series of actions  
9 culminating in 1954.

10 Q. In addition to ending segregation, the military took other  
11 steps to end racial discrimination and to ease racial tensions  
12 during the Vietnam era; that's right?

13 A. Yes. In response to a profound outbreak of racial  
14 conflict and violence, the U.S. military took significant steps  
15 to try to address the racial conflict.

16 Q. And one of those steps, West Point began a campaign to  
17 attract future Black officers; is that right?

18 A. Yes.

19 Q. And even before that, they looked to ROTC programs to  
20 increase the number of Black cadets; is that accurate?

21 A. Before which point?

22 Q. Oh, sorry. Before the Vietnam era, maybe in the '60s?  
23 Or when did it begin?

24 A. That was an effort that really began later, akin to the  
25 efforts to increase the number who were attending West Point.

1 Q. And the Army developed an affirmative action plan during  
2 that time as well; is that right?

3 A. All services were required by the Department of Defense to  
4 develop an affirmative actions plan.

5 Q. Actions, yes. Thank you.

6 You've not conducted research into race relations in the  
7 military in the 1980s; is that correct?

8 A. I have not.

9 Q. Or the 1990s?

10 A. My focus on race relations in the military is in the  
11 Vietnam era.

12 Q. And just to clarify, you're not an expert on issues of  
13 race in the U.S. military for events that occurred in the 21st  
14 century either?

15 A. No. I'm not claiming expertise in the 21st century.

16 Q. The last violent racial conflict within the U.S. Army  
17 mentioned in your report was in the mid-1970s; is that correct?

18 A. Early to mid-1970s, I believe.

19 Q. And you have no evidence of any violent racial conflict  
20 within the U.S. Army after the mid-1970s; is that accurate?

21 A. I don't offer any evidence of major violent racial  
22 conflict after the 1970s. I argue that the steps that were  
23 taken by the U.S. military did have a powerful effect on  
24 reducing racial conflict within the military.

25 Q. Do you know exactly what the last violent racial conflict

1 was in the mid-1970s that's addressed in your report or in your  
2 deposition?

3 A. I don't believe I mentioned one.

4 Q. Would you agree that the incidences on the U.S. aircraft  
5 carriers, like the Constellation and Hassayampa and the  
6 Kitty Hawk, those were the mid-'70s; is that accurate?

7 A. Those were in 1972.

8 Q. Would you agree that's about 50 years ago, approximately  
9 50 years ago?

10 A. A little more than 50 years ago, yeah.

11 Q. Yes, ma'am.

12 And would you agree that in your report you don't discuss  
13 any historical events that happened since 1980?

14 A. My expertise in this report is on the period during the  
15 Vietnam War primarily. But let me -- let me explain why that  
16 matters.

17 The U.S. military has traditionally put an enormous amount  
18 of emphasis on history. The services train their members to  
19 understand their own histories, the history of the U.S. Navy,  
20 the Marine Corps, the Army, the Air Force, even the brief  
21 history of the Space Force. They train their officers in  
22 military history, and they emphasize the importance to their  
23 leaders of looking to history for lessons, for lessons learned.

24 So what I'm offering in my report and my testimony is the  
25 history that is available for military leaders to look back to.

1 So what I've shown is that military leaders in this era  
2 believed that the lack of visible Black leadership played a  
3 significant role in fostering racial conflict, and the presence  
4 of Black military leaders might ameliorate racial conflict.

5 When they encountered this massive level of racial  
6 violence that they believed threatened the ability of the  
7 services to defend the United States against its enemies, they  
8 wanted all tools available at their disposal. And many  
9 believed that visible Black leadership, that more Black  
10 officers would make a difference. And they weren't available.  
11 Their hands were tied.

12 They didn't have a tool that they believed was going to be  
13 important.

14 I go as far as saying they didn't have a weapon they  
15 needed because of decisions that had been made in the past.

16 So while what we're talking about is segregation ending  
17 70 years ago, we're talking about the Vietnam War ending  
18 50 years ago, we're talking about the last major racial  
19 conflict in the United States military being probably in the  
20 middle of the 1970s, lessons learned, based on history, is a  
21 traditional approach of the U.S. military, and providing that  
22 history is what my report attempts to do.

23 Q. And that history in your report is limited to events that  
24 took place during the mid-1970s and prior; is that accurate?

25 A. As I just said, I focused on a period of racial conflict.

1 Q. Okay. And you would agree that making any prediction  
2 about what will happen if the Naval Academy stops using race in  
3 the admissions process would be outside the scope of your  
4 historical expertise; is that correct?

5 A. My historical expertise is historical. I don't  
6 prognosticate. I don't predict.

7 MS. WYRICK: Nothing further, Your Honor.

8 THE COURT: All right. Thank you, Ms. Wyrick.

9 Ms. Gargeya, any redirect?

10 MS. GARGEYA: No, Your Honor.

11 THE COURT: All right. Thank you very much,  
12 Dr. Bailey. And thank you for your time. In the unlikely  
13 event you're called back to the witness stand, it's probably  
14 wise that you don't talk to anyone about your testimony in case  
15 you were to be called back to the witness stand. This trial is  
16 due to end next week sometime.

17 But we appreciate you being here, and thank you very much.

18 THE WITNESS: Thank you, Your Honor.

19 THE COURT: With that, Mr. Mendez, the next witness, I  
20 believe, is going to be John Sherwood, correct?

21 MR. MENDEZ: Yes, Your Honor.

22 THE COURT: He's being called as a defense expert.

23 Mr. Sherwood, come up forward, please, and be sworn.

24 Good afternoon to you, sir. Thank you.

25 (Witness sworn.)

1           **THE CLERK:** Before we get started, if you don't mind  
2 stating and spelling your first and last name for the record.

3           **THE WITNESS:** First name John, J-O-H-N. Last name  
4 Sherwood, S-H-E-R-W-O-O-D.

5           **THE CLERK:** Thank you.

6                           **DIRECT EXAMINATION**

7 **BY MR. MENDEZ:**

8 **Q.** Good afternoon, Dr. Sherwood.

9 Could you please state your full name for the record.

10 **A.** John Darrell Sherwood.

11 **Q.** Where do you currently work?

12 **A.** The Naval History and Heritage Command.

13 **Q.** What is your title?

14 **A.** Historian.

15 **Q.** And what is the Naval History and Heritage Command?

16 **A.** It's the historical agency of the U.S. Navy.

17 **Q.** Is the Naval History and Heritage Command a part of the  
18 Navy?

19 **A.** It is. We report to the Office of the Chief of Naval  
20 Operations.

21 **Q.** And what are your job responsibilities as the historian at  
22 the Naval History and Heritage Command?

23 **A.** I write books and articles. I conduct historical research  
24 and answer questions posed by the Office of the Chief of Naval  
25 Operations, the Navy fleets, and other Navy and DoD commands.

1 I give talks and presentations. I'm the host of a podcast at  
2 the U.S. Naval Academy.

3 Q. How long have you held this position?

4 A. Since October of 1997.

5 Q. I'd like to talk a bit about your educational background  
6 and about your work experience in a little bit more detail.

7 Where did you attend college?

8 A. Columbia College in the City of New York.

9 Q. Did you earn a degree from Columbia College?

10 A. I did. AB in history.

11 Q. After college, did you attend graduate school?

12 A. Yes.

13 Q. Where did you go to graduate school?

14 A. I went to graduate school at Columbia University and The  
15 George Washington University.

16 Q. Did you earn a graduate degree from Columbia University?

17 A. Yes.

18 Q. In what field?

19 A. History.

20 Q. Did you earn a degree from George Washington University?

21 A. I did.

22 Q. In what field?

23 A. History.

24 Q. And what degree did you obtain from George Washington  
25 University?

1 A. I attained two degrees from GW; an infill degree, a  
2 master's in philosophy and history and a Ph.D. in history. And  
3 my master's degree from Columbia was an AM in history.

4 Q. What was your dissertation on?

5 A. The social history of Air Force fighter pilots in the  
6 Korean War.

7 Q. Did you take any courses on American history?

8 A. Yes.

9 Q. Did you take any courses on American military history?

10 A. Yes.

11 Q. Did you take any courses on historiography?

12 A. Yes.

13 Q. And could you explain for the record what historiography  
14 is.

15 A. Historiography is the study of history, of historical  
16 interpretations, and writing history.

17 Q. And what did you do after you graduated with your Ph.D. in  
18 history from George Washington University?

19 A. I worked for the U.S. Army Center of Military History.

20 Q. What did you do at the U.S. Army Center for Military  
21 History?

22 A. I was a historian.

23 Q. How long did you hold that position at the U.S. Army  
24 Center for Military History?

25 A. Two years.



1 Q. And what did you do afterwards?

2 A. I went to work for the Naval Historical Center which was  
3 the predecessor agency of the Naval History and Heritage  
4 Command.

5 Q. And do you have additional training that is relevant to  
6 your work as a historian?

7 A. Yes, I do. I was a Fulbright Scholar in 2019. I  
8 regularly attend conferences and workshops. And I keep up with  
9 the field by reading literature in the field.

10 Q. Is there a field within history where you focus on in your  
11 work?

12 A. Modern naval history.

13 Q. Do you focus on a particular time period?

14 A. Yes. From the end of World War II to 2011, approximately.

15 Q. And could you define for the record what modern naval  
16 history is.

17 A. Modern naval history usually refers to 20th-century naval  
18 history.

19 Q. And could you please describe the work that you've done on  
20 naval history during that time period?

21 A. I've written three books on the air war in Vietnam. I've  
22 written a book on brown-water operations during the Vietnam  
23 War. I have written a book on racial unrest in the fleet  
24 during the Vietnam War. And most recently, a book on  
25 humanitarian operations post 2011.

1 Q. Do you have experience working on other periods of naval  
2 history?

3 A. I do. I've worked in all areas of naval history.

4 Q. Could you describe some of the work you've done.

5 A. Well, my book *Black Sailor, White Navy*, actually begins  
6 the story during the Age of Sail. I've done some work on the  
7 Barbary Wars. I've answered questions on everything from the  
8 War of 1812 all the way through the present, including  
9 World War II.

10 Q. And could you describe for the record what the Age of Sail  
11 is.

12 A. The Age of Sail in American naval history generally refers  
13 to the American Revolution up through the early 19th century,  
14 when they were still sailing vessels in the Navy.

15 Q. Have you studied the Naval Academy's history?

16 A. Yes.

17 Q. Could you please describe the work you've done on the  
18 Naval Academy's history.

19 A. So I've read all the existing literature on race relations  
20 and racial integration at the Naval Academy. I've read a  
21 number of modern histories. And through my work on the Preble  
22 Hall Podcast, I have learned quite a bit about the history of  
23 the Naval Academy by interviewing various authors.

24 Q. Could you describe, at a general level, your methodology  
25 when conducting your work as a historian focusing on naval

1 history.

2 A. So I look at a variety of sources. I look at primary  
3 sources, which I generally define as documents, archival  
4 documents, and oral histories. Typically, oral histories that  
5 I conduct myself. I look at secondary literature, which  
6 consists of published books and articles. And then I look at  
7 government reports and government studies that are not easily  
8 accessible to the general public.

9 Q. Have you given talks on naval history?

10 A. Yes.

11 Q. Have you received any recognition for your work on naval  
12 history?

13 A. Yes. My book *War in the Shallows* received the 2015 NASO  
14 Award for the best book published in naval and maritime history  
15 in 2015.

16 Q. At some point, were you asked to provide your expert  
17 opinions on certain issues in this case?

18 A. Yes.

19 Q. What issues were you asked to opine on?

20 A. I was asked to opine on the history of African Americans  
21 in the Navy and the history of African Americans at the Naval  
22 Academy.

23 Q. And how would you describe the methodology that you used  
24 in preparing for your testimony?

25 A. I used similar methodology that I use to write books.

1 However, given the short time period, I had to rely heavily on  
2 my own books; so preexisting research, a chronology that I  
3 wrote for the NHHHC website on the history of African Americans  
4 in the Navy, books by my former colleague Robert J. Schneller,  
5 oral histories, documents, studies that I have in my files.

6 Q. Is the methodology that you use widely used by other  
7 historians?

8 A. Yes.

9 Q. And did your reliance on these materials that you  
10 mentioned allow you to reach certain opinions in this case?

11 A. Yes.

12 MR. MENDEZ: Your Honor, at this time, we'd like to  
13 move to have Dr. Sherwood qualified as an expert witness in the  
14 Navy's history with race and the Naval Academy's history with  
15 race.

16 THE COURT: Essentially, African Americans in the Navy  
17 and African Americans in the Naval Academy?

18 MS. GARGEYA: With a focus on that, yes, Your Honor.

19 THE COURT: Any voir dire, Ms. Wyrick -- I'm sorry,  
20 Mr. Connolly?

21 MR. CONNOLLY: No.

22 THE COURT: All right. So his expertise is accepted  
23 and not challenged, and he'll be entitled to give his opinions  
24 in those areas.

25 MR. MENDEZ: Thank you, Your Honor.

1 **BY MR. MENDEZ:**

2 **Q.** Dr. Sherwood, do you recall preparing a declaration in  
3 support of the government's opposition to plaintiff's motion  
4 for a preliminary injunction last year?

5 **A.** Yes.

6 **Q.** And generally speaking, what did that declaration focus  
7 on?

8 **A.** So that declaration focused on the history of African  
9 Americans in the Navy with a particular emphasis on racial  
10 unrest in the Navy and a history of racial integration at the  
11 Naval Academy and a response to the plaintiff's complaint.

12 **Q.** Does your declaration contain the opinions that you intend  
13 to offer today?

14 **A.** Yes.

15 **MR. MENDEZ:** Your Honor, at this time, we'd like to  
16 offer Defendant's Exhibit 197 into evidence.

17 **THE COURT:** Defendant's Exhibit 197 will be admitted  
18 into evidence with the same caveat as previous reports on both  
19 sides in this case that to the extent there's any hearsay  
20 implications woven therein, I'll be able to discount those, as  
21 this is a bench trial. But his entire report as set forth, I  
22 believe originally filed as Paper Number 46 in this case, will  
23 be admitted into evidence as Defendant's Exhibit 197.

24 **MR. MENDEZ:** Understood, Your Honor. Thank you.

25 **BY MS. GARGEYA:**

1 Q. Dr. Sherwood, have you prepared a demonstrative exhibit to  
2 assist the Court in following your testimony today?

3 A. Yes.

4 MR. MENDEZ: Your Honor, the government moves for  
5 admission of Defendant's Demonstrative DD3 into evidence.

6 THE COURT: So admitted.

7 BY MR. MENDEZ:

8 Q. Dr. Sherwood, do your slides include a summary of the  
9 opinions you're offering today?

10 A. Yes.

11 Q. Would you describe for the Court your first opinion,  
12 Dr. Sherwood.

13 A. Okay. My first opinion is that the lack of Black  
14 representation in the Navy's Officer Corps contributed to  
15 racial tension and unrest during World War II, which hindered  
16 naval readiness, national security, and domestic security.

17 Q. Would you describe for the Court your second opinion.

18 A. My second opinion is that the lack of Black representation  
19 in the Officer Corps contributed to the eruption of full-blown  
20 riots during the Vietnam War, which threatened naval readiness,  
21 national security, and domestic security.

22 Q. Could you describe for the Court your third opinion.

23 A. Yes. My third opinion. As the Naval Academy and other  
24 commissioning sources commissioned more Black officers  
25 beginning in the mid-'70s, Black representation in the

1 Officer Corps increased, and the Navy has not since experienced  
2 major incidents of racial unrest.

3 Q. Are you offering any opinions on today's Navy?

4 A. No.

5 Q. Are you offering any opinions on today's Marine Corps?

6 A. No.

7 Q. Are you offering any opinions on today's Naval Academy?

8 A. No.

9 Q. Are you offering any opinions trying to predict the future  
10 based on the past?

11 A. No.

12 Q. I'd like to start with your first opinion.

13 At a general level, could you describe racial relations in  
14 the Navy before World War II.

15 A. Yes. Before World War II -- well, African Americans have  
16 served in every war. They tend to -- tended to make strides  
17 during wartime when they were greatly needed, only to see those  
18 gains taken away between wars.

19 For the most part, African Americans in the Navy performed  
20 the most menial-type jobs in a segregated environment.

21 Q. Were there any African American officers in the Navy  
22 before World War II?

23 A. No.

24 Q. And could you describe the conditions for African American  
25 sailors before World War II.

1 A. Yes. African American sailors were mostly -- existed in  
2 primarily a segregated environment, serving in the worst  
3 positions, so as messmen on the mess deck, as unrated sailors,  
4 so engaged in menial labor, such as coal heaving, so coaling  
5 the ships. That type of thing.

6 Q. Could you explain for the record, Dr. Sherwood, what  
7 messmen, what does that means.

8 A. So a messman is someone who works on the mess decks. And  
9 it can mean preparing food, so anything from chopping onions to  
10 peeling potatoes. But a lot of their work involved serving  
11 food and, of course, cleaning.

12 Q. At a general level, can you describe racial relations in  
13 the Marine Corps before World War II?

14 A. There were no African Americans in the Marine Corps prior  
15 to World War II.

16 Q. Why not?

17 A. Because the Marine Corps did not want African Americans  
18 in -- in its service.

19 Q. Are you aware of any instances of racial tension in the  
20 Navy and Marine Corps before World War II?

21 A. Yes.

22 Q. Could you provide an example.

23 A. So during the Red Summer of 1919, there were incidents of  
24 racial unrest throughout the country. And in Charleston,  
25 South Carolina, Washington, D.C., and Chicago, there were race



1 riots. And during these race riots that I mentioned, these  
2 three, White sailors and, in some cases, aided by White Marines  
3 attacked Black communities.

4 Q. What effect did this incident have on the Navy?

5 A. It stigmatized the Navy in the eyes of the Black  
6 community, and it also made the Black community very reluctant  
7 to want to send their children to the Navy, especially given  
8 the jobs that their kids would have to perform in the Navy.

9 Q. Now, let's turn to World War II. Can you describe the  
10 conditions for Black sailors and Marines during that period.

11 A. So during World War II, it was a continued segregated  
12 environment. And towards the end of the war, in 1944, there  
13 was a series of incidents of racial unrest. The first incident  
14 was the Chicago -- the Port Chicago explosion and then mutiny.  
15 And there were others.

16 Q. Could you provide another one of those examples you're  
17 referring to.

18 A. Yes. Closely associated with Port Chicago is the nearby  
19 Mare Island. 258 Black sailors protested in solidarity with  
20 what happened in Port Chicago.

21 There was a Guam riot where 48 Black sailors were arrested  
22 and imprisoned.

23 In Port Hueneme, there was a hunger strike.

24 I want to turn back to Port Chicago for one minute. I did  
25 not explain that of the 320 munitions workers, those handling

munitions, loading ships with munitions, two-thirds of the victims were Black. So 220 out of the 320 killed were Black.

Q. Why were 220 out of the 320 victims Black?

A. Because this was considered a very dangerous, menial job; and therefore, Blacks were assigned to do that job out of -- for reasons of institutional racism.

Q. And what effect did these instances of racial tension during World War II that you just described have on the Navy?

A. So the four incidents that I mentioned are all some of the most important logistics facilities in the Pacific.

Guam, in the Central Pacific, is known as the great supermarket of the Pacific. It was key.

Port Hueneme is the major CB base on the West Coast; another key installation.

And Port Chicago and Mare Island were key for moving munitions across the Pacific.

And this was a time, of course, where there were a number of key battles that were fought, and also when the U.S. military was preparing to invade the Japanese homeland. So these facilities were absolutely vital.

Q. I want to turn to your second opinion.

At a general level, could you describe racial relations in the Marine Corps during the Vietnam War?

A. Yes. During the Vietnam War, the Marine Corps suffered significant racial unrest, especially towards the end of the

1 '60s, in 1969.

2 Q. Were there specific instances of racial unrest in the  
3 Marine Corps during the Vietnam War?

4 A. Yes, there were. There was a riot at the third meth break  
5 in Vietnam.

6 There was a -- probably the largest riot occurred in  
7 July 1969 at Camp Lejeune, but there were problems at  
8 Camp Lejeune throughout that year; over 160 assaults, muggings,  
9 robberies, with racial undertones.

10 Q. And at a general level, can you describe race relations in  
11 the Navy from 1964 to 1971?

12 A. So during that period, there were not very many African  
13 Americans in the Navy, so the racial unrest in the Navy came a  
14 bit later, but there were still -- I found one incident in  
15 1969.

16 Q. Could you describe the incident in 1969.

17 A. Yes. Destroyer Collette, its crew, it was at Subic Bay in  
18 the Philippines, and its sailors were coming back from leave,  
19 and there had been fights during liberty between Black and  
20 White sailors, and that threatened to spill over on the ship.  
21 One of the ship's officers, an African American by the name of  
22 William Kelley, he found out about it. He donned his dress  
23 blue uniform, complete with his sword. He confronted the  
24 sailors coming back to the ship, both White sailors and Black  
25 sailors, and he said that he will have none of that on the

1 Collette. And that quelled a potential riot on the Collette.

2 Q. How do you know that William Kelley was able to quell what  
3 was a potential race riot?

4 A. I was first told about it by another officer on the ship,  
5 Charles Chadbourn, now a Naval War College professor and a  
6 colleague of mine at the Naval History and Heritage Command.  
7 And I then interviewed Bill Kelley as well.

8 Q. And earlier, you mentioned that during the Vietnam War up  
9 until 1971, there weren't many African Americans. Can you  
10 explain why?

11 A. Because the Navy practiced what is known as qualitative  
12 recruitment. We had a draft. And the draft -- during the  
13 draft, if you had a low draft number, you would try to join  
14 either the Navy or the Air Force because there was less  
15 likelihood that you would have to serve in combat in Vietnam.  
16 And so the Navy had the pick of the crop and it only recruited  
17 high scorers, and those high test scorers happened to be White.

18 Q. Did the Navy rely on the draft during the Vietnam War?

19 A. No, it did not.

20 Q. Were there instances of racial unrest in the Navy starting  
21 in 1972?

22 A. Yes.

23 Q. Could you provide some examples.

24 A. 1972 was a year where the Navy saw an influx of African  
25 Americans because the draft was being scaled back in the early

1 '70s by President Nixon, and all of a sudden, the Navy had to  
2 man its ships, and it did so by lowering recruitment standards.  
3 And that brought in a large number of African Americans,  
4 lowering -- by "recruitment standards," I meant it was able to  
5 choose or take sailors with lower test scores.

6 And so the first riot occurred on Kitty Hawk. That was  
7 one of the biggest; 48 sailors were injured.

8 There was one on the oiler Hassayampa, the Aircraft  
9 Carrier Constellation, the dock landing ship Trenton Naval  
10 Station, Midway Island, the Aircraft Carrier Ticonderoga, the  
11 Aircraft Carrier Intrepid, the amphibious assault ship Inchon,  
12 and Kaohsiung Fleet Landing, which is in Taiwan.

13 Q. How did the end of the draft around that 1972 period  
14 result in an influx in African Americans in the Navy?

15 A. Well, earlier in the war, Secretary of Defense Robert  
16 McNamara enacted a program called Project 100,000, which  
17 allowed the military to lower its recruitment standards to  
18 basically bring in more troops that were needed in Vietnam.  
19 That is why the ground services experienced racial unrest  
20 before the Navy.

21 The Navy did not have to use that tool until the draft was  
22 scaled back. And it used that tool to recruit Category 3 and  
23 Category 4 recruits. And those recruits came into the Navy, in  
24 many cases, with only an eighth-grade education. Some of them  
25 were completely illiterate. And they did not have the scores

1 to make the rate to get -- the skills and education to get into  
2 a specialized rating, so they ended up working basically the  
3 same jobs that their fathers, grandfathers, and  
4 great-grandfathers performed, so menial work.

5 Q. Were there other instances of racial unrest in the Navy  
6 starting in 1972?

7 A. There were many. As I mentioned, Hassayampa,  
8 Constellation, Intrepid, Ticonderoga, Midway Island. The  
9 Atlantic Fleet reported 57 incidents of racial unrest that  
10 year.

11 Q. Were there investigations into these incidents?

12 A. Yes. After each incident, typically there's what's called  
13 a JAG Manual Investigation, so an officer is assigned to gather  
14 facts and come up with opinions about what happened in each  
15 case.

16 Q. And at a general level, what were the results of the  
17 investigations?

18 A. At a general level, it was found that a number of factors  
19 contributed. The ones that I highlight as the most significant  
20 were discrimination in promotion and job assignments, a climate  
21 of racism, a racially-based disciplinary system.

22 And by that, I mean court-martials and Article 15  
23 hearings. There was a perception that African Americans were  
24 being brought up -- were being disciplined more than White  
25 sailors. Ineffective minority affairs councils. And most

1 significantly, a lack of Black sailors in the Navy's chain of  
2 command. So a lack of Black officers and a lack of senior  
3 enlisted. So petty officer first class and chief petty  
4 officers.

5 Q. With those results that came from those investigations  
6 that you just mentioned, did they relate to a particular set of  
7 incidents of racial unrest?

8 A. Yes. I looked at Trenton Naval Station, Midway Island,  
9 Ticonderoga, Intrepid, Inchon, Kaohsiung, plus Kitty Hawk, the  
10 Constellation, and Hassayampa to come up with those. I looked  
11 at the investigations. I also look at some OPNAV documents, so  
12 Office of Chief Naval Operations documents, to try to determine  
13 what the most prevalent causes of those incidents were.

14 Q. I want to spend some time breaking down some of other  
15 instances of racial unrest during the Vietnam War.

16 And I want to start with Kitty Hawk. What happened on  
17 Kitty Hawk?

18 A. Okay. The Kitty Hawk, you had a large influx of African  
19 American sailors. You had many of them working in menial jobs,  
20 living in segregated berthing, and many of whom were being  
21 brought up to captain's masts, which are Article 15 hearings.  
22 You could actually be reduced in rank. You could receive brig  
23 time, based just on the captain's orders.

24 They went to Subic Bay. They did what sailors do at  
25 Subic Bay, which is drink a lot of alcohol. And they came

1 back, and there was a riot, and 47 people were injured.

2 Q. What exactly happened when they came back?

3 A. So when they came back, they took makeshift weapons and  
4 started going through the ship, in some cases bludgeoning  
5 people while they were asleep in their racks. And various  
6 people tried to intervene. The captain of the ship,  
7 Marland Townsend, whom I interviewed, tried to get on the one  
8 MC, which is the intercom system, and tell these people to  
9 stand down.

10 The Marine detachment commander also tried to find groups  
11 of these sailors and tell them to lay down their weapons as  
12 well.

13 The only person that was successful in getting -- in  
14 quelling this riot was a guy named Ben Cloud, half African  
15 American, half Native American. And he was able to talk to  
16 these people, as a Black man. And when he approached them, he  
17 actually gave -- he rendered the Black Power salute and quoted  
18 Martin Luther King, discussed why they should lay down their  
19 arms. And at the end, he took off his shirt and said, "If you  
20 don't believe me, you can kill me right now." And he did that  
21 not only to say, "I'm willing to put down -- or to lay down my  
22 life for my ship and my shipmates, but I'm also Black, just  
23 like you."

24 Q. You had mentioned there's a Marine detachment aboard  
25 Kitty Hawk. Why is that?



1 A. Back during the Vietnam War, they assigned Marines to  
2 aircraft carriers. Their primary duty was to protect special  
3 weapons, so nuclear weapons. But they also performed a  
4 security role on the ship.

5 Q. And what would have happened, had Ben Cloud not been able  
6 to suppress the riot?

7 A. So I interviewed Nicolas Carlucci, the Marine deck  
8 commander, a long interview. And accordingly to Carlucci, he  
9 was on the verge of ordering his Marines to fire at the rioters  
10 and basically use live fire. And if he had done that on the  
11 ship, a number of bad things would have happened.

12 First of all, a lot of rioters would have been killed.  
13 Second of all, ricocheting bullets would have killed a lot of  
14 other people, including some Marines. Aircraft would have been  
15 damaged. Munitions might have been set off. There might have  
16 been a fire. Almost certainly, the aircraft carrier would have  
17 been pulled offline.

18 Q. What does it mean for a ship to be taken offline?

19 A. So in the Vietnam War, it usually means to move away from  
20 an area where it could launch combat aircraft against targets  
21 in North Vietnam and move to the Philippines for liberty, for  
22 repair, replenishment, that type of thing.

23 Q. And what impact does taking a ship offline have?

24 A. So, in October 12th, this was the finale of Operation  
25 Linebacker I. Operation Linebacker I would only last until

1 October 23rd.

2 So this air power campaign was designed to put pressure on  
3 the North Vietnamese government to agree to a peace agreement  
4 that was amenable to the Nixon Administration.

5 We typically had between one and five carriers online,  
6 with the average being three. And if you take one offline,  
7 that's taking an air wing with 85 combat aircraft out of the  
8 picture. And at this time, the Air Force -- the Navy was the  
9 predominant air power provider because the Air Force had pretty  
10 much pulled out of Southeast Asia at this point.

11 Q. Do you believe that Ben Cloud's race is one of the reasons  
12 why the riot ended?

13 A. Absolutely.

14 Q. Why do you believe that?

15 A. Because he was the only officer who was able to get  
16 through to the protest group, who was able to communicate with  
17 them and convince them to lay down their harms.

18 Q. And now I want to turn to the Constellation.

19 What happened on the Constellation?

20 A. The Constellation was a bit different, but similar in  
21 other respects. There had been a number of disciplinary cases  
22 against Black sailors. Black sailors were performing menial  
23 jobs, so mainly working on the mess decks. In solidarity with  
24 what happened on the Kitty Hawk, they decided to strike, to do  
25 a sit-down strike. And this didn't happen thousands of miles

1 away from the U.S. It happened in the port of San Diego,  
2 basically under the blare of media.

3 And so when that happened, everybody found out that the  
4 Navy was having trouble with racial unrest. Congress got  
5 involved. Admiral Zumwalt, the CNO, was nearly fired as a  
6 consequence.

7 Q. And what effect did this incident on the Constellation  
8 have on the Navy?

9 A. So the Constellation did not get to Vietnam until January  
10 of 1973, so essentially after the war ended. It was not there  
11 for the most critical second part of Linebacker, Linebacker II,  
12 which that was the Christmas bombing. And it's critical  
13 because the Navy had aircraft, A-6s and A-7s that were  
14 absolutely vital for the suppression of any enemy air defense  
15 system. So they bombed surface-to-air missile sites.

16 The more of those planes that are available, the fewer  
17 B-52s would have been lost. So it's a life-saving proposition  
18 here.

19 Q. And what happened on Hassayampa?

20 A. Hassayampa was an oiler, an ocean class oiler. And there  
21 were only six of those produced. It had a riot after liberty  
22 at Subic Bay. And oilers are not the most visible ships in the  
23 Navy, but they are supremely important because without them,  
24 ships can't be on the line for very long, they have to return  
25 for fuel and ammunition.

1 Q. What were some of the main causes of the three incidents  
2 that you were just describing, Kitty Hawk, Constellation,  
3 Hassayampa?

4 A. So perceived discrimination in job assignments, an unfair  
5 disciplinary system, a ineffective minority affairs councils,  
6 and most significantly, a lack of African Americans in the  
7 chain of command. And also, a really toxic liberty  
8 environment, at least with the Hassayampa and Kitty Hawk at  
9 Olongapo and Subic Bay in the Philippines.

10 Q. Did these instances of racial unrest during the Vietnam  
11 War undermine naval readiness?

12 A. Yes.

13 Q. Did these instances of racial unrest during the Vietnam  
14 War threaten operational effectiveness?

15 A. Absolutely.

16 Q. Did these incidents of racial unrest during the Vietnam  
17 War threaten national security?

18 A. Yes.

19 Q. I want to turn to your third opinion.

20 When did the first African American graduate from the  
21 Naval Academy?

22 A. 1949.

23 Q. What was his or her name?

24 A. His name was Wesley Brown.

25 Q. Was he the first African American appointed to the Naval

1 Academy?

2 A. No.

3 Q. Who was the first African American appointed to the Naval  
4 Academy?

5 A. Midshipmen John [sic] Conyers in 1872. And because of the  
6 racism he experienced, he didn't last -- he didn't last very  
7 long. He ended up having to leave the Academy.

8 Q. Were there other Black midshipmen who attended the Naval  
9 Academy between 1872 and 1945?

10 A. There were Black midshipmen who were nominated and a very  
11 small number who actually got admitted, so they passed both the  
12 physical and mental tests to get to be admitted. But they all  
13 experienced severe institutional racism and individual racism  
14 that prevented them from graduating. And some of these  
15 students came from some of the top Black high schools in the  
16 country.

17 One of them even had several years of college education,  
18 and they still couldn't get through the program because they  
19 simply did not have the support of the brigade. They were  
20 not -- if they had academic issues, they couldn't just walk  
21 down the hall at Bancroft Hall and get help. They would have  
22 to go and find a professor during office hours, that type of  
23 thing.

24 So they were victims of excessive hazing that was racially  
25 based, racial epithets. I can go on.

1 Q. Did the percentage of African Americans in the brigade  
2 increase during the 1950s?

3 A. After Wes Brown graduated in 1949, there were only a very  
4 small number of African Americans who graduated from the Naval  
5 Academy year by year, up until the mid-'70s.

6 Q. So did the percentage of African Americans in the brigade  
7 increase during the 1960s?

8 A. Not by very much.

9 Q. Did the percentage of African Americans in the brigade  
10 increase during the 1970s?

11 A. Yes. That's where you see a significant increase.

12 Q. And why did you see a significant increase of African  
13 Americans in the brigade during the 1970s?

14 A. Well, when President Johnson saw that the Naval Academy  
15 was graduating less than five Black midshipmen per year in the  
16 mid-'60s, out of a brigade of 4,000, he was wondering what was  
17 going on. He ordered the Naval Academy to change its -- to  
18 start trying to recruit African American midshipmen. So they  
19 began implementing a number of measures designed to increase  
20 the number of African Americans in the brigade.

21 Q. Was there an effort to increase the number of African  
22 Americans in the Officer Corps during -- starting in the 1970s?

23 A. Yes, there was. Admiral Zumwalt and his successor,  
24 Admiral Holloway -- James Holloway, III -- believed that the  
25 key to solving the Navy's racial problems was by increasing

1 Black representation in the Officer Corps and also in the  
2 higher ranks of the enlisted -- the higher enlisted ranks as  
3 well.

4 Q. It what percentage of officers in the Navy were African  
5 American in 1962?

6 A. .2 percent.

7 Q. What percentage of African American officers in the Navy  
8 were African American in 1978?

9 A. 2.1 percent.

10 Q. And can you describe the efforts that contributed to the  
11 increase of African Americans in the Navy's Officer Corps.

12 A. So there were a number of programs. One was establishing  
13 NROTC, Naval Reserve Officer Training Core units, at  
14 historically Black colleges, starting with Prairie View A&M, in  
15 Texas. That was one methodology.

16 Another methodology was a program called Boost which took  
17 promising leaders from educationally underprivileged  
18 backgrounds, both White, Black, Hispanic, whatever, gave them  
19 two years of intensive college preparatory training with the  
20 idea that they would then attend college and gain their  
21 commission either through the Naval Academy, the NROTC or OCS,  
22 Officer Candidate School in Newport, Rhode Island.

23 And there was also an effort by the Naval Academy to  
24 increase Black enrollment there and also utilize the Naval  
25 Academy Prep School to try to get more African Americans into

1 the pipeline.

2 Q. Could you explain what NROTC is for the record.

3 A. Naval Reserve Officer Training Corps. These are -- these  
4 are units at college and universities that provide students  
5 with military training during the course of their four years,  
6 especially during summers.

7 And then at the end of their -- well, when they graduate  
8 from college, they also receive a reserve commission, either in  
9 the U.S. Navy, the U.S. Marine Corps, the Naval Reserve or the  
10 Marine Corps Reserve.

11 Q. And can you explain precisely how the Naval Academy played  
12 a role in the increasing diversity in the Officer Corps.

13 A. Yeah. The Naval Academy is the flagship commissioning  
14 vehicle. It's the only vehicle that provides regular  
15 commissions. The other programs provide reserve commissions --  
16 or the NROTC program provides reserve commissions.

17 It -- and so it was -- 40 percent of admirals are Naval  
18 Academy graduates. About 90 percent of the CNOs are Naval  
19 Academy graduates. So if you're going to -- if you're going to  
20 increase Black participation in the Officer Corps, you might  
21 start with the Naval Academy.

22 Q. You mentioned that about 90 percent of CNOs are Naval  
23 Academy graduates.

24 Could you explain for the record what a CNO is.

25 A. The CNO is the chief of naval operations, so the



1 equivalent of the Army or Air Force chief of staff, so the  
2 highest-ranking naval officer.

3 Q. Have there been major instances of racial unrest in the  
4 Navy since the mid-1970s?

5 A. No.

6 Q. Why haven't there been major instances of racial unrest in  
7 the Navy since the mid-1970s?

8 A. Because the Navy has done a much better job with equal  
9 opportunity. It's provided ways for African Americans to work  
10 in other jobs besides the mess deck. It's done a good job at  
11 getting African Americans into the Officer Corps, getting  
12 African Americans into senior enlisted positions. And for  
13 those reasons and more, there haven't been incidents of racial  
14 unrest since -- since the early '70s.

15 Q. Has the Naval Academy played a role in preventing major  
16 instances of racial unrest in the Navy since the mid-1970s?

17 A. Yes. The Naval Academy produces role models. And to have  
18 those role models spread across the fleet has a strong and  
19 powerful impact on the enlisted Corps.

20 MR. MENDEZ: Thank you.

21 THE COURT: Thank you, Mr. Mendez.

22 Cross-examination, Mr. Connolly?

23 CROSS EXAMINATION

24 BY MR. CONNOLLY:

25 Q. Good afternoon, Dr. Sherwood. We met at your deposition.

1 It's nice to see you again.

2 For much of the 20th century, African Americans had a lot  
3 of reasons to be angry with how they were treated by this  
4 country, correct?

5 A. In the 20th century?

6 Q. Yes.

7 A. Well, up through the end of the '70s, yes.

8 Q. During World War I and World War II, the U.S. Navy was  
9 practicing segregation, correct?

10 A. Yes.

11 Q. The racial segregation caused anger among the African  
12 Americans in the Navy, correct?

13 A. Correct.

14 Q. In society at large during World War II, there was racial  
15 segregation through much of the country, correct?

16 A. During World War II, yes.

17 Q. During the World War II era, African Americans in the  
18 military were subjected to overt racial hostilities, such as  
19 racial slurs, correct?

20 A. Yes. Many of them were.

21 Q. And, in fact, that was very common back then, correct?

22 A. Correct.

23 Q. During the Vietnam War era, there were still racial  
24 tensions in American society as a whole, correct?

25 A. Yes.

1 Q. There was the "long, hot summer" in 1967, correct?

2 A. Yes.

3 Q. During that summer, there were many race riots that  
4 erupted across major cities in the United States, correct?

5 A. Correct.

6 Q. And Martin Luther King was assassinated during this time  
7 period, correct?

8 THE COURT: Dr. King was assassinated in 1968, not  
9 1967, Mr. Connolly.

10 MR. CONNOLLY: Sorry, I was talking about the Vietnam  
11 War era, in general.

12 BY MR. CONNOLLY:

13 Q. Was Dr. Martin Luther King assassinated during the Vietnam  
14 War era?

15 A. Yes. 1968.

16 Q. And his assassination caused more racial unrest, correct?

17 A. Correct.

18 Q. During the Vietnam War era, the Navy also was treating  
19 African Americans poorly, correct?

20 A. Can you repeat the question?

21 Q. Well, let me give you some specifics.

22 During the Vietnam War era, there was discrimination in  
23 promotion and job assignments for African American sailors,  
24 correct?

25 A. Correct.

1 Q. There was a climate of racism as demonstrated by the  
2 regular use of racial slurs by Whites against Blacks, correct?

3 A. Correct.

4 Q. There was a racially biased disciplinary system, or one  
5 perceived to be biased by Black sailors, correct?

6 A. It was perceived to be racially biased. And the reason it  
7 was perceived as such is with the influx of low scoring sailors  
8 who came into the fleet not understanding the Uniform Code of  
9 Military Justice, not understanding how the military worked,  
10 they ended up going to captain's masts quite frequently. And  
11 because of that, the perception amongst these Black crews is,  
12 "Oh, my word, you know, the only sailors we see at mast are  
13 African Americans." But they were being basically charged with  
14 an offense that a White sailor could be charged with.

15 Q. And during this time period, there were ineffective  
16 minority affairs councils with no real power in the chain of  
17 command, correct?

18 A. Correct. Admiral Zumwalt issued an all-NAV message to  
19 try -- and created these minority affairs councils with good  
20 intentions. But it was a new thing for the Navy, and it was  
21 outside the traditional chain of command. And some of the  
22 people -- I talked, in one case, to a dentist who was assigned  
23 to be -- a White dentist who was assigned to be the head of the  
24 minority affairs council for his ship. And so it had some  
25 teething trouble.

1 Q. Now, all of these problems that we just discussed in the  
2 Vietnam War era, they caused a lot of anger among Black  
3 sailors, correct?

4 A. Yes. And also, segregated berthing, segregated liberties,  
5 yes.

6 Q. And, in fact, the discrimination in promotion in job  
7 assignments for Black sailors was a significant cause of racial  
8 unrest in the Navy, correct?

9 A. Can you repeat the question, please.

10 Q. The discrimination in promotion in job assignments for  
11 Black sailors was a significant cause of racial unrest in the  
12 Navy, correct?

13 A. Correct.

14 Q. The climate of racism as demonstrated by the regular use  
15 of racial slurs by Whites against Blacks was a significant  
16 cause of racial unrest in the U.S. Navy, correct?

17 A. During the Vietnam War period, yes.

18 Q. And the racially -- the perception of the racially biased  
19 disciplinary system was a significant cause of racial unrest in  
20 the U.S. Navy, correct?

21 A. During the Vietnam War era, yes.

22 Q. And the ineffective minority affairs councils with no real  
23 power in the chain of command was a significant cause of racial  
24 unrest in the U.S. Navy during the Vietnam War era, correct?

25 A. Correct.

1 Q. Now, in your testimony today, you discussed the three  
2 efforts that the Navy undertook to increase the number of  
3 African Americans in the Navy. Do you recall that?

4 A. Yes.

5 Q. With the Naval ROTC -- with the effort -- the Naval ROTC  
6 efforts, were actually the biggest success story in minority  
7 recruiting, correct, of the three?

8 A. Well, that was aided by Boost because Boost produced  
9 qualified applicants who could get into college and get into  
10 these programs.

11 Q. Okay. So let's turn to Boost. Project Boost was not  
12 limited to African Americans, correct?

13 A. Correct.

14 Q. In fact, Project Boost targeted educationally  
15 underprivileged people of all races, correct?

16 A. Correct.

17 Q. And in the 1970s, you also discussed how the Naval Academy  
18 increased its effort to recruit African Americans, correct?

19 A. Correct. One of the things it did was send out blue and  
20 gold teams to black high schools, high schools that were  
21 predominantly Black. It increased the number of minority  
22 recruiters within the Academy, within the admissions  
23 department.

24 Q. And to your knowledge, the Naval Academy did not change  
25 its standards in order to admit more African Americans,

1 correct?

2 A. Correct. During this period.

3 Q. During this period.

4 Your declaration identifies no significant outbreak of  
5 racial unrest in the Navy since the mid-1970s, correct?

6 A. Yes.

7 Q. You testified earlier that since the Vietnam War era,  
8 there has been an increase in African American graduates at the  
9 Naval Academy, correct?

10 A. During the period I look at, yes.

11 Q. But you have conducted no study that found that the  
12 increase in Black Naval Academy graduates caused the decrease  
13 in racial incidents experienced in the Navy and the Marine  
14 Corps, correct?

15 A. Can you repeat the question, please.

16 Q. You have conducted no study that found that the increase  
17 in Black Naval Academy graduates caused the decrease in racial  
18 incidents experienced in the Navy and Marine Corps, correct?

19 A. I have looked at the historical literature and the  
20 writings of Admiral Holloway, who was the CNO after Zumwalt.  
21 And Admiral Holloway and the literature argue -- makes that  
22 argument.

23 Q. I'm going to repeat my question once more.

24 You, personally, have conducted no study that found that  
25 the increase in Black Naval Academy graduates caused the

1 decrease in racial incidents experienced in the Navy and Marine  
2 Corps, correct?

3 A. I have not conducted studies. I've look at that  
4 historical literature, at the works of authors who have look at  
5 studies.

6 Q. And you are a historian, correct?

7 A. Correct.

8 Q. And I believe you already testified about this, but you --  
9 in your declaration, you have offered no opinion about what  
10 will happen to the number of African Americans attending the  
11 Naval Academy if the Academy stops using race in the admissions  
12 process, correct?

13 A. As I said, I'm not predicting the future and not looking  
14 at the present, correct.

15 Q. And in your declaration, you are not predicting that there  
16 will be significant outbreaks of racial unrest if the Naval  
17 Academy stops using race in the admissions process, correct?

18 A. I'm only looking at what happened in the past. My  
19 examples come from the past. It's bad historical practice to  
20 try to predict the future, as a historian.

21 Q. I just want to make sure I have -- that we're saying the  
22 same thing.

23 In your declaration, you are not predicting that there  
24 will be significant outbreaks of racial unrest if the Naval  
25 Academy stops using race in the admissions process, correct?



1 A. Correct.

2 MR. CONNOLLY: No further questions.

3 THE COURT: Thank you, Mr. Connolly.

4 Mr. Mendez, anything further on redirect?

5 MR. MENDEZ: Nothing further, Your Honor.

6 THE COURT: I just have one question here,  
7 Professor Sherwood. In terms of your historical studies -- and  
8 I know that you're still -- you're a civilian employee of the  
9 Department of the Navy. You work for the Department of the  
10 Navy, correct?

11 THE WITNESS: Correct.

12 THE COURT: And essentially, your area of focus has  
13 been modern naval history from World War II to 2011, some  
14 13 years ago?

15 THE WITNESS: Correct.

16 THE COURT: All right. In looking at that history,  
17 what is the -- in terms of the trends here in history, what is  
18 the time frame with respect to, I guess, officers in the  
19 pipeline?

20 Professor Bailey, I think, noted -- exactly her words  
21 were, "The military can't poach from the private sector. They  
22 have to grow their own." Which means you just can't bring  
23 somebody in who's an expert from General Motors and make them  
24 an O6. You might make them department -- Secretary of Defense,  
25 like with McNamara, but from General Motors, but you can't

1 import.

2 And I guess my question is: What is the historical trend  
3 and the timeline for having to create your own?

4 **THE WITNESS:** Having to create your own?

5 **THE COURT:** Well, I'll give you the quote. I  
6 understood what it means. I hope you do. I mean, I'm trying  
7 to ask the question. It doesn't seem very complicated.

8 Professor Bailey noted, "The military cannot poach from  
9 the private sector." They can't recruit from the private  
10 sector. They can't put people into certain slots, 05s or 06s  
11 or 07s, flag rank. "They have to grow their own." That's just  
12 what she said. I think I understood what she meant.

13 I'm interested, in terms of your point of view,  
14 historically, how long does it take to grow your own?

15 **THE WITNESS:** Well, it takes decades if you want to  
16 grow an admiral. If you want to grow a senior enlisted person,  
17 it may take a decade.

18 **THE COURT:** It takes a good decade or two easily to  
19 get to be an 06 or an 05, correct?

20 **THE WITNESS:** Correct. And it's not just time in  
21 grade. There are a variety of experiences you have to have  
22 served in.

23 For example, I'm working on a leadership book based on the  
24 life of Admiral Mullen, and he had to command at the destroyer  
25 level and the cruiser level, the carrier battle group level.

1 He had to hold a number of positions within the Pentagon and  
2 attend specialized school at Newport and Idaho Falls and also  
3 the naval postgraduate school in Monterey just to become what  
4 he calls a "baby admiral," a one-star admiral.

5 **THE COURT:** Thank you very much.

6 Anything further on that from my question, Mr. Mendez?

7 **MR. MENDEZ:** Nothing further, Your Honor.

8 **THE COURT:** Mr. Connolly, anything further on that?

9 **MR. CONNOLLY:** Nothing further, Your Honor.

10 **THE COURT:** Thank you very much, Professor Sherwood.

11 You can step down. And you surely shouldn't discuss your  
12 testimony with anyone in the unlikely event you're called back  
13 to the witness stand next week. This case is scheduled to end  
14 sometime next week. So thank you very much.

15 **THE WITNESS:** Thank you.

16 **THE COURT:** Now, Mr. Strawbridge, I understand that  
17 that's it for -- and, Mr. Gardner, that's it today for  
18 witnesses; is that right?

19 **MR. STRAWBRIDGE:** I believe that's right, Your Honor.

20 **THE COURT:** We're finished?

21 **MR. GARDNER:** That's correct, Your Honor.

22 **THE COURT:** All right. Let me just -- in terms of the  
23 ranking of witnesses next week, if you can make sure you give  
24 that to Ms. Hudson and Ms. Manogue here so I can plan  
25 accordingly.

1 We're doing reasonably well, right? I mean, to project  
2 finishing up certainly by next Friday, if not next Thursday.

3 Is that right from your point of view, Mr. Strawbridge?  
4 What do you think?

5 **MR. STRAWBRIDGE:** Yes. I think right now, we're  
6 fairly confident that the witness testimony will probably wrap  
7 up no later than Wednesday, and we could do closings on  
8 Thursday.

9 **THE COURT:** From your point of view, Mr. Gardner,  
10 that's correct as well?

11 **MR. GARDNER:** That's according to our schedule too,  
12 Your Honor.

13 **THE COURT:** Okay. That's fine. As I say, I'm not  
14 rushing you. You take as much time as you want. I hope you  
15 all realize that. I blocked a lot of time off.

16 The one thing I want to emphasize is, is that in terms of  
17 the exhibits -- I might have said this before, but let's make  
18 sure the timing here. In terms of the exhibits and the  
19 attachments and the slides -- the slides are very beneficial --  
20 I just want to make sure that you all are available, your staff  
21 is available to help Ms. Herndon and my law clerks in terms of  
22 identifying those items that are in evidence.

23 It's a considerable volume of documents that there have  
24 been general references and there are exhibits that have not  
25 totally been exhibited on the screen, but they're still in

1 evidence. And we have to make sure that we're real clear and  
2 we don't have any confusion over that.

3       Once this is over, and I write my opinion -- and  
4 obviously, I'm not going to stand by my normal standard of  
5 having an opinion out in a week, after a bench trial, and not  
6 with this case. It certainly wasn't with UNC and Harvard, and  
7 I'm not going to do this in a week.

8       But I'm really trying to make sure we don't have a  
9 situation where I reference an exhibit and somebody notices on  
10 the appellate ladder, as it goes up, that that wasn't in  
11 evidence or there's some later dispute. So you all can  
12 coordinate on this.

13       My point is, if there is a dispute, then I will address  
14 it. Okay. So we're clear on it. That's my main point.

15       I'm not looking for issues. By the same token, I'm more  
16 than willing to be available to make sure that we have it  
17 right. And unlike a lot of closing arguments, particularly at  
18 jury trials, you're looking at exhibits and there's a rush  
19 getting ready and people are looking at the exhibits and are  
20 ready to do their oratory. Well, I'm looking forward to your  
21 oratory as well. But I want to make sure we get really  
22 clear -- we have plenty of time -- what the exhibits are.

23       Mr. Gardner.

24       **MR. GARDNER:** We've been working very cooperatively.  
25 We've submitted to Ms. Herndon today every document that has

1 been admitted, I guess, as of yesterday. And then we agreed to  
2 provide her with an updated set on Wednesday.

3 **THE COURT:** All right. And then let's assume if we  
4 have closing argument on Thursday, that you still will be able  
5 to get to me proposed findings of fact, conclusions of law by  
6 the following Wednesday.

7 **MR. GARDNER:** That's right.

8 **THE COURT:** That'll be fine as well.

9 **MR. GARDNER:** One question for you, Your Honor. We  
10 were talking amongst the parties. Do you have a preferred  
11 format for receiving the proposed findings of fact?

12 **THE COURT:** No. I mean -- no, not really.

13 **MR. GARDNER:** We talked internal -- or together about  
14 doing numbered paragraphs. Is that okay?

15 **THE COURT:** Yeah, that's fine. That's fine. The  
16 findings of fact would be helpful to have numbered paragraphs.  
17 I'm sorry. In terms of like as you did it for the pretrial  
18 order, for example. I do prefer that there be numbered  
19 findings of fact.

20 **MR. GARDNER:** Terrific. That's how we'll approach it  
21 then.

22 **MR. STRAWBRIDGE:** Would Your Honor also like us, after  
23 we file them, to submit a Word version to Ms. Hudson?

24 **THE COURT:** Submit what?

25 **MR. STRAWBRIDGE:** To submit a Word version to

1 Ms. Hudson?

2           **THE COURT:** That's fine. That would be good as well.  
3 Yeah, thank you.

4           Anything else from the point of view of the plaintiff?

5           **MR. STRAWBRIDGE:** No, Your Honor.

6           **THE COURT:** Anything else from the point of view of  
7 the defense?

8           **MR. GARDNER:** Nothing from the government.

9           **THE COURT:** Thank you all very much. You had a  
10 productive week. And my compliments. I'm pleased that these  
11 younger lawyers were allowed to ask questions here and get  
12 involved on both sides. That's wonderful, to allow the  
13 opportunity for young lawyers. And they all did well. I'm not  
14 sure how much they've done it before. But they did well. And  
15 just remember, you know how you felt today when you did that?  
16 You're going to feel the same way 25 years from now. You  
17 understand? Not a thing changes. And all of you did very  
18 well.

19           Okay. With that, we stand adjourned for the week. Thank  
20 you all very much.

21           **THE CLERK:** All rise. This Honorable Court is now  
22 adjourned.

23           (Court adjourned at 3:50 p.m.)  
24  
25

CERTIFICATE OF OFFICIAL REPORTER

I, Ronda J. Thomas, Registered Merit Reporter, Certified Realtime Reporter, in and for the United States District Court for the District of Maryland, do hereby certify, pursuant to 28 U.S.C. § 753, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 21st day of September 2024.

*Ronda J. Thomas*

Ronda J. Thomas, RMR, CRR  
Federal Official Reporter



<b>BY MR. CARMICHAEL:</b> [21] 4/5/20 25/11/20 9/21 10/17 11/74 12/4 <b>BY MR. MENDEZ:</b> [5] 19/17 20/12 30/2 30/6 102/13 <b>BY MR. MORTARA:</b> [11] 46/14 52/21 53/11 56/25 58/19 62/8 63/8 67/25 73/14 76/1 87/19 <b>MR. CARMICHAEL:</b> [8] 3/15 7/21 8/25 9/20 10/15 11/3 11/23 16/25 <b>MR. CONNOLLY:</b> [5] 17/3 156/21 179/10 185/2 187/9 <b>MR. GARDNER:</b> [9] 18/15 187/21 188/11 189/24 190/7 190/9 190/13 190/20 191/8 <b>MR. MENDEZ:</b> [21] 19/5 20/8 20/11 30/5 40/8 43/24 54/16 55/5 59/8 59/18 102/12 103/5 149/21 156/12 156/25 157/15 157/24 158/4 177/20 185/5 187/7 <b>MR. MORTARA:</b> [55] 17/13 17/19 18/2 40/11 44/9 46/3 46/13 46/19 52/15 53/7 53/24 54/2 54/4 54/7 54/10 54/20 54/24 55/7 55/15 55/21 55/23 55/25 56/4 56/24 58/15 59/15 60/1 60/4 60/9 60/12 60/18 60/22 61/1 61/6 61/19 62/19 62/24 63/1 63/5 63/11 67/14 67/18 67/23 73/12 73/18 75/23 77/3 77/6 79/17 81/10 87/14 87/18 89/2 103/8 104/7 <b>MR. STRAWBRIDGE:</b> [5] 187/19 188/5 190/22 190/25 191/5 <b>MS. GARGEYA:</b> [13] 104/2 104/4 111/24 113/17 114/4 114/9 114/24 124/16 127/19 128/14 141/4 149/10 156/18 <b>MS. WYRICK:</b> [2] 112/3 149/7 <b>THE CLERK:</b> [17] 3/7 3/9 18/22 18/25 19/3 61/12 61/14 61/18 81/2 81/5 104/22 105/1 128/6 128/9 150/1 150/5 191/21 <b>THE COURT:</b> [132] 3/2 3/13 3/22 4/4 12/1 17/1 17/4 17/16 17/20 18/6 18/17 19/4 19/14 20/3 20/7 20/9 29/24 40/9 40/12 44/1 45/25 46/5 46/17 46/20 53/9 54/1 54/3 54/6 54/8 54/18 54/21 55/6 55/9 55/16 55/22 55/24 56/1 56/5 58/18 59/10 59/16 59/19 60/3 60/5 60/11 60/16 60/20 60/23 61/3 61/9 61/20 62/3 62/6 62/11 62/22 62/25 63/2 63/7 63/10 64/2 64/6 67/17 67/21 67/24 73/17 75/25 77/5 77/8 77/16 78/2 78/5 78/9 78/12 78/19 78/24 79/13 79/16 80/22 81/7 87/13 87/17 89/3 103/6 103/15 103/21 104/3 104/5 104/11 104/15 112/2 112/4 113/15 113/18 114/12 114/19 114/25 127/22 128/11 141/5 149/8 149/11 149/19 149/22 156/16 156/19 156/22 157/17 158/6 177/21 179/8 185/3 185/6 185/12 185/16 186/5 186/18 187/5 187/8 187/10 187/16 187/20 187/22 188/9 188/13 190/3 190/8 190/12 190/15 190/24 191/2 191/6 191/9 <b>THE WITNESS:</b> [31] 3/12 4/3 18/21 19/2 20/6 46/21 52/18 59/14 61/16 62/5 62/7 64/5 77/15 77/24 78/3 78/6 78/11 78/17 78/20 79/10 79/15 103/20 104/25 149/18 150/3 185/11 185/15 186/4 186/15 186/20 187/15 <b>\$</b> <b>\$50</b> [1] 130/21 <b>\$50 million</b> [1] 130/21 <b>'</b> <b>'23</b> [1] 97/2 <b>'50s</b> [1] 123/20 <b>'58</b> [1] 19/21 <b>'60s</b> [4] 136/21 145/22 163/1 174/16 <b>'70</b> [1] 131/21 <b>'70s</b> [7] 144/23 147/6 158/25 165/1 174/5 177/14 178/7 <b>'89</b> [1] 142/17 <b>'99</b> [1] 42/16 <b>.</b> <b>.1</b> [1] 88/6 <b>.1 percent</b> [1] 88/6 <b>.2</b> [1] 175/6 <b>.2 percent</b> [1] 175/6 <b>.4</b> [3] 85/13 85/16 85/19 <b>0</b> <b>0.4 percent</b> [1] 135/14 <b>03</b> [1] 62/15	<b>0402</b> [1] 15/1 <b>05</b> [1] 186/19 <b>05s</b> [1] 186/10 <b>06</b> [5] 62/14 64/23 137/20 185/24 186/19 <b>06s</b> [1] 186/10 <b>07s</b> [1] 186/11 <b>1</b> <b>1,001</b> [1] 88/11 <b>1,200</b> [1] 101/22 <b>1.76</b> [3] 85/13 85/16 85/19 <b>10</b> [13] 10/16 26/24 26/25 27/4 28/4 32/10 32/15 32/24 51/16 51/20 66/1 132/22 137/24 <b>10 minutes</b> [2] 127/24 128/5 <b>10 percent</b> [1] 117/2 <b>10 years</b> [1] 89/18 <b>10-minute</b> [2] 80/23 81/1 <b>100,000</b> [1] 165/16 <b>10:12</b> [2] 1/7 3/1 <b>10th</b> [1] 105/12 <b>11</b> [1] 100/17 <b>11 years</b> [1] 107/6 <b>1100</b> [1] 88/11 <b>1130</b> [1] 20/15 <b>11:50</b> [1] 81/4 <b>12</b> [4] 16/17 105/14 105/16 132/22 <b>1200</b> [1] 88/12 <b>12:03</b> [1] 81/4 <b>12th</b> [1] 169/24 <b>13</b> [1] 8/3 <b>13 years</b> [1] 185/14 <b>14</b> [2] 87/12 110/21 <b>148</b> [3] 83/12 87/13 102/12 <b>15</b> [3] 66/1 166/22 167/21 <b>151</b> [4] 66/23 73/17 73/18 73/19 <b>151-4</b> [2] 67/9 67/9 <b>16</b> [2] 25/4 45/17 <b>160</b> [1] 163/8 <b>164</b> [2] 100/4 102/2 <b>17</b> [3] 11/24 100/16 102/9 <b>1812</b> [1] 154/8 <b>1872</b> [2] 173/5 173/9 <b>19</b> [4] 93/6 93/10 97/14 97/18 <b>1919</b> [1] 160/23 <b>1931</b> [1] 131/21 <b>1940s</b> [1] 144/19 <b>1942</b> [1] 117/14 <b>1943</b> [1] 118/10 <b>1944</b> [2] 119/8 161/12 <b>1945</b> [2] 117/16 173/9 <b>1948</b> [1] 119/25 <b>1949</b> [2] 172/22 174/3 <b>1950s</b> [2] 144/21 174/2 <b>1951</b> [1] 120/6 <b>1952</b> [1] 120/8 <b>1953</b> [1] 121/11 <b>1954</b> [2] 120/14 145/9 <b>196</b> [2] 113/15 113/18 <b>1960s</b> [5] 123/20 123/24 144/23 145/1 174/7 <b>1962</b> [3] 134/22 137/14 175/5 <b>1963</b> [1] 134/22 <b>1964</b> [1] 163/11 <b>1967</b> [4] 115/6 116/2 179/1 179/9 <b>1968</b> [8] 129/1 129/3 135/11 135/13 137/22 138/8 179/8 179/15 <b>1969</b> [5] 127/8 163/1 163/7 163/15 163/16 <b>197</b> [3] 157/16 157/17 157/23 <b>1970s</b> [20] 131/14 135/1 135/25 137/22 139/12 146/17 146/18 146/20 146/22 147/1 148/20 148/24 174/10 174/13 174/22 177/4 177/7 177/16 182/17 183/5 <b>1971</b> [4] 130/4 134/4 163/11 164/9 <b>1972</b> [7] 129/18 131/8 147/7 164/21 164/24 165/13 166/6 <b>1973</b> [1] 171/10 <b>1978</b> [1] 175/8 <b>1980</b> [1] 147/13 <b>1980s</b> [1] 146/7 <b>1981</b> [1] 15/19 <b>1983</b> [1] 15/19 <b>1985</b> [3] 14/6 14/8 63/19 <b>1986</b> [2] 106/21 142/1 <b>1988</b> [1] 142/17 <b>1990s</b> [1] 146/9 <b>1994</b> [1] 50/11 <b>1995</b> [5] 20/24 50/11 51/11 52/19 52/19 <b>1996</b> [2] 15/4 16/18 <b>1997</b> [4] 15/5 16/4 16/19 151/4	<b>1998</b> [1] 107/5 <b>1999</b> [4] 21/6 23/25 42/14 45/18 <b>19th</b> [1] 151/1 <b>1:00</b> [2] 127/20 127/23 <b>1:08</b> [1] 128/8 <b>1:23-cv-2699-RDB</b> [1] 1/5 <b>1A</b> [1] 97/4 <b>2</b> <b>2-13</b> [1] 8/3 <b>2.1 percent</b> [1] 175/9 <b>2.5</b> [1] 21/10 <b>20</b> [5] 1/7 2/2 25/4 89/14 137/5 <b>20 percent</b> [1] 94/11 <b>20 years</b> [3] 14/13 137/21 137/24 <b>2000</b> [1] 24/6 <b>2001</b> [1] 14/9 <b>2004</b> [1] 107/6 <b>2005</b> [1] 14/11 <b>2006</b> [4] 24/6 71/18 72/4 72/9 <b>2010</b> [1] 65/13 <b>2011</b> [4] 29/15 153/14 153/25 185/13 <b>2013</b> [3] 8/4 8/9 29/15 <b>2014</b> [4] 14/15 73/16 85/3 105/14 <b>2015</b> [5] 65/13 89/23 107/9 155/13 155/15 <b>2016</b> [1] 71/6 <b>2019</b> [1] 153/7 <b>2020</b> [2] 37/20 85/3 <b>2021</b> [2] 78/13 108/7 <b>2022</b> [3] 71/18 72/4 72/9 <b>2022/'23</b> [1] 97/2 <b>2023</b> [16] 56/13 56/14 57/23 58/4 70/4 70/6 71/3 72/6 73/16 74/4 79/20 79/22 97/20 100/11 102/4 108/7 <b>2023's</b> [3] 97/5 97/14 98/13 <b>2024</b> [4] 1/7 2/2 14/15 192/12 <b>20th</b> [8] 106/12 121/12 142/5 142/9 143/12 144/12 178/2 178/5 <b>20th-century</b> [1] 153/17 <b>21</b> [2] 102/6 124/18 <b>21st</b> [3] 146/13 146/15 192/12 <b>22-23USNADashboard.xlsx</b> [1] 67/7 <b>220</b> [3] 124/16 162/2 162/3 <b>23</b> [1] 108/5 <b>23rd</b> [1] 170/1 <b>23USNADashboard.xlsx</b> [1] 67/7 <b>24 hours</b> [1] 126/4 <b>24th Regiment</b> [1] 120/24 <b>25</b> [1] 93/5 <b>25 articles</b> [1] 110/24 <b>25 percent</b> [3] 22/16 46/2 46/8 <b>25 years</b> [1] 191/16 <b>250</b> [1] 117/18 <b>258</b> [1] 161/19 <b>26</b> [1] 23/25 <b>26 percent</b> [1] 88/10 <b>26677</b> [1] 71/17 <b>27 years</b> [2] 15/10 15/12 <b>28</b> [2] 86/1 192/6 <b>289</b> [1] 10/16 <b>292</b> [1] 11/24 <b>2:00</b> [2] 127/24 128/5 <b>2:16</b> [1] 128/8 <b>3</b> <b>3.3 percent</b> [1] 135/13 <b>3.5</b> [3] 19/25 20/4 20/10 <b>30</b> [1] 92/16 <b>30 percent</b> [2] 92/16 93/5 <b>30 years</b> [2] 64/20 89/14 <b>30,000</b> [1] 137/5 <b>30th</b> [1] 79/20 <b>320</b> [4] 119/12 161/25 162/2 162/3 <b>33 percent</b> [1] 92/16 <b>34</b> [1] 96/19 <b>35 percent</b> [1] 88/10 <b>36</b> [2] 76/7 92/13 <b>36 percent</b> [1] 100/12 <b>3:50</b> [1] 191/23 <b>3rd</b> [3] 24/14 27/11 35/23 <b>3rd Battalion</b> [2] 27/10 35/25 <b>4</b> <b>4,000</b> [1] 174/16 <b>4.0</b> [2] 20/4 21/11 <b>4.6</b> [4] 83/9 85/15 85/19 85/22 <b>40</b> [1] 127/8 <b>40 percent</b> [1] 176/17 <b>400</b> [1] 119/13 <b>46</b> [1] 157/22
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<b>4</b>
<b>47 [1]</b> 168/1
<b>47 months [1]</b> 80/6
<b>479 [1]</b> 71/15
<b>48 [2]</b> 161/21 165/7
<b>491 [2]</b> 53/25 58/16
<b>5</b>
<b>50 [4]</b> 86/19 91/15 91/18 102/3
<b>50 percent [2]</b> 22/6 46/2
<b>50 years [4]</b> 147/8 147/9 147/10 148/18
<b>520 [1]</b> 135/12
<b>52s [1]</b> 171/17
<b>55 percent [1]</b> 100/16
<b>57 [1]</b> 166/9
<b>6</b>
<b>6 percent [2]</b> 91/22 101/25
<b>60 percent [3]</b> 86/20 91/15 91/18
<b>65 [1]</b> 117/14
<b>65 percent [1]</b> 120/9
<b>6s [1]</b> 171/13
<b>7</b>
<b>7 percent [1]</b> 88/9
<b>70 [1]</b> 101/25
<b>70 years [1]</b> 148/17
<b>75 [1]</b> 101/25
<b>75 percent [4]</b> 69/6 69/8 69/12 69/25
<b>750 [2]</b> 27/14 36/4
<b>753 [1]</b> 192/7
<b>77.3 percent [1]</b> 72/15
<b>782 [1]</b> 56/24
<b>785 [1]</b> 58/2
<b>792 [1]</b> 58/17
<b>7s [1]</b> 171/13
<b>8</b>
<b>800 [1]</b> 42/6
<b>805 [1]</b> 113/21
<b>807 [1]</b> 113/25
<b>83.2 percent [1]</b> 72/12
<b>85 combat [1]</b> 170/7
<b>87 [1]</b> 74/6
<b>88.6 percent [1]</b> 72/9
<b>89 [1]</b> 57/2
<b>9</b>
<b>90 percent [2]</b> 176/18 176/22
<b>97 [1]</b> 58/15
<b>A</b>
<b>a.m [3]</b> 1/7 3/1 81/4
<b>AB [1]</b> 151/10
<b>abilities [1]</b> 16/11
<b>ability [3]</b> 123/10 133/16 148/6
<b>able [19]</b> 16/15 34/10 60/25 70/20 79/17 93/21 99/4 99/14 101/10 101/11 121/3 157/20 164/2 165/4 168/15 169/5 170/15 170/16 190/4
<b>aboard [4]</b> 15/17 16/11 89/17 168/24
<b>about [106]</b> 24/6 25/4 25/10 28/16 28/23 29/20 30/12 30/22 33/14 37/16 37/19 41/4 41/18 42/6 42/11 42/17 42/21 42/23 42/24 43/1 43/5 43/8 48/18 48/20 51/17 51/21 53/3 56/13 58/22 58/25 63/20 66/1 66/20 67/5 68/22 70/4 75/21 80/21 80/23 81/13 82/4 82/7 82/10 86/3 88/6 88/10 91/18 92/8 92/16 96/12 96/13 101/22 105/23 108/22 109/12 109/15 110/2 110/24 112/25 117/6 118/6 119/2 124/13 127/1 127/8 128/18 128/19 129/22 130/17 130/19 131/4 131/9 131/15 131/17 132/1 132/6 132/7 135/17 135/20 136/18 137/2 137/8 137/9 137/13 137/25 139/8 142/7 142/7 147/8 148/16 148/17 148/18 149/2 149/14 151/5 151/6 154/22 163/22 164/4 166/14 176/18 176/22 179/10 184/8 184/9 190/13
<b>above [4]</b> 1/9 4/22 117/18 192/9
<b>above-entitled [2]</b> 1/9 192/9
<b>absence [1]</b> 74/3
<b>absolute [1]</b> 5/17
<b>absolutely [12]</b> 20/11 39/21 54/7 66/11 78/17 122/7 126/14 131/7 162/20 170/13 171/14 172/15
<b>academia [1]</b> 142/12
<b>academic [36]</b> 5/21 21/17 21/23 22/4 22/6 43/16 57/11 73/24 74/13 75/1 75/13 76/9 82/10 82/12 82/17 82/22 83/10 85/7 85/12

86/1 86/13 86/16 89/1 90/20 91/23 93/21 94/25 97/2 97/10 100/19 101/19 105/19 108/12 121/13 173/19
<b>academically [5]</b> 47/16 75/7 75/10 92/1 93/25
<b>academics [11]</b> 75/20 80/21 82/11 85/23 91/5 91/9 92/4 93/22 94/20 95/8 101/16
<b>Academies [2]</b> 138/17 138/19
<b>academy [165]</b> 1/6 1/21 4/10 4/12 4/20 5/3 5/10 5/22 5/24 14/6 19/13 19/19 19/24 20/2 20/14 20/18 20/19 20/21 21/2 21/3 21/5 21/7 21/9 21/21 22/5 22/15 22/19 23/4 27/10 27/12 35/24 36/1 38/11 39/4 39/9 41/5 41/20 41/23 42/2 42/13 42/18 43/1 43/5 43/12 43/15 43/20 44/16 44/20 45/12 47/21 48/11 48/21 48/24 48/24 49/1 49/4 49/6 49/13 49/23 49/25 50/1 50/8 50/8 50/13 51/5 51/9 51/13 51/23 52/2 52/7 53/2 53/13 53/15 55/4 60/15 63/19 64/14 65/1 65/18 66/5 66/7 66/21 69/10 69/24 70/7 70/10 70/18 70/24 72/21 74/20 74/23 75/16 76/19 77/1 79/6 82/12 84/18 84/21 86/16 86/16 87/9 90/17 91/6 91/13 92/2 92/5 92/10 93/12 94/9 94/14 94/19 95/10 95/24 96/1 96/10 96/24 97/21 98/15 98/21 99/13 101/3 101/10 101/12 102/7 102/10 115/19 149/2 151/2 154/20 154/23 155/22 156/17 157/11 158/23 159/7 172/21 173/1 173/4 173/7 173/9 174/5 174/14 174/17 175/21 175/23 175/25 176/11 176/13 176/18 176/19 176/21 176/23 177/15 177/17 182/17 182/22 182/24 183/9 183/12 183/17 183/25 184/11 184/11 184/17 184/25
<b>Academy's [3]</b> 154/15 154/18 156/14
<b>accept [1]</b> 125/9
<b>accepted [6]</b> 20/17 20/19 49/25 50/6 112/5 156/22
<b>access [4]</b> 35/10 35/12 71/23 117/11
<b>accessed [1]</b> 47/6
<b>accessible [1]</b> 155/8
<b>accession [1]</b> 48/7
<b>accomplished [2]</b> 120/14 137/19
<b>according [3]</b> 17/22 87/24 188/11
<b>accordingly [2]</b> 169/8 187/25
<b>account [1]</b> 122/19
<b>accountability [1]</b> 8/20
<b>accountable [1]</b> 27/1
<b>accounts [2]</b> 86/19 100/16
<b>accurate [5]</b> 142/20 145/20 146/20 147/6 148/24
<b>achieve [4]</b> 10/23 34/23 34/24 36/20
<b>achieved [2]</b> 49/3 53/16
<b>Achievement [1]</b> 111/12
<b>acknowledgement [1]</b> 87/8
<b>across [6]</b> 108/5 117/1 123/7 162/16 177/18 179/4
<b>action [4]</b> 23/21 41/16 135/4 146/1
<b>actions [7]</b> 132/18 135/3 135/4 135/5 145/8 146/4 146/5
<b>active [7]</b> 8/10 23/6 38/4 64/20 64/25 84/20 89/22
<b>actors [1]</b> 4/13
<b>actual [2]</b> 10/24 83/19
<b>actually [16]</b> 3/22 32/2 58/8 58/10 60/5 62/11 67/5 70/18 80/11 85/16 136/24 154/5 167/22 168/17 173/11 182/6
<b>ad [1]</b> 134/3
<b>ADAM [2]</b> 1/12 121/9
<b>add [1]</b> 40/23
<b>added [1]</b> 133/22
<b>addition [3]</b> 70/25 117/19 145/10
<b>additional [3]</b> 121/19 129/23 153/5
<b>additionally [1]</b> 75/7
<b>address [4]</b> 132/9 133/16 145/15 189/13
<b>addressed [4]</b> 51/6 51/13 61/25 147/1
<b>adequately [1]</b> 132/24
<b>adherence [1]</b> 34/20
<b>adhering [1]</b> 38/24
<b>adjourned [3]</b> 191/19 191/22 191/23
<b>adjust [1]</b> 104/22
<b>administered [1]</b> 136/11
<b>Administration [1]</b> 170/4
<b>Admiral [15]</b> 57/19 62/18 65/8 133/10 133/13 171/5 174/23 174/24 180/18 183/20 183/21 186/16 186/24 187/4 187/4
<b>Admiral Holloway [3]</b> 174/24 183/20 183/21
<b>Admiral Mullen [1]</b> 186/24
<b>Admiral Zumwalt [3]</b> 171/5 174/23 180/18

<b>admirals [1]</b> 176/17
<b>admire [1]</b> 53/4
<b>admission [1]</b> 52/12 52/12 52/7 53/13 55/3 58/4 114/10 143/25 158/5
<b>admissions [37]</b> 1/3 1/21 4/10 4/20 5/2 42/19 43/2 43/6 43/12 43/15 43/16 49/5 50/5 50/8 50/10 51/11 52/19 52/22 53/2 53/22 54/14 56/19 57/2 57/6 57/9 57/11 57/13 58/1 58/3 93/23 103/12 141/13 149/3 182/22 184/11 184/17 184/25
<b>admit [2]</b> 4/13 182/25
<b>admitted [21]</b> 5/24 44/3 49/23 50/7 50/12 51/4 51/8 51/23 66/23 96/20 100/5 113/19 114/2 117/12 117/15 157/17 157/23 158/6 173/11 173/12 190/1
<b>adopt [2]</b> 4/15 14/2
<b>adopted [2]</b> 121/24 122/2
<b>adopting [1]</b> 5/5
<b>Advanced [1]</b> 26/13
<b>adversity [2]</b> 44/18 44/25
<b>advice [2]</b> 66/2 109/11
<b>Advisory [2]</b> 108/17 109/4
<b>affairs [9]</b> 89/19 130/21 131/3 166/25 172/5 180/16 180/19 180/24 181/22
<b>affect [8]</b> 32/5 77/20 116/17 118/20 123/22 126/12 126/16 129/16
<b>affected [4]</b> 32/8 53/17 140/11 144/8
<b>affiliated [1]</b> 108/8
<b>affirmative [3]</b> 135/3 146/1 146/4
<b>Afghanistan [1]</b> 90/13
<b>afoul [1]</b> 55/23
<b>Africa [1]</b> 27/24
<b>African [112]</b> 32/21 49/6 49/14 71/7 71/8 72/15 72/21 72/22 72/24 73/2 73/4 82/16 82/22 83/9 85/13 85/21 86/20 88/4 88/7 88/8 92/4 93/6 93/7 93/11 94/12 96/16 100/11 100/17 101/3 101/24 102/3 102/6 102/9 116/6 116/11 116/15 116/20 116/22 117/3 117/8 117/11 117/16 117/20 117/24 118/5 118/22 119/9 119/18 120/10 121/6 125/6 127/8 138/11 138/18 140/5 143/25 144/7 145/3 155/20 155/21 156/3 156/16 156/17 157/8 159/15 159/19 159/21 159/24 160/1 160/14 160/17 163/12 163/21 164/9 164/24 165/3 165/14 166/23 167/18 168/14 172/6 172/20 172/25 173/3 174/1 174/4 174/6 174/9 174/12 174/18 174/20 174/21 175/4 175/7 175/8 175/11 175/25 177/9 177/11 177/12 178/2 178/11 178/17 179/19 179/23 180/13 182/3 182/12 182/18 182/25 183/8 184/10
<b>African American [3]</b> 71/7 72/15 82/22
<b>Afro [1]</b> 140/2
<b>Afro-American [1]</b> 140/2
<b>after [49]</b> 8/10 17/22 20/25 21/1 24/17 24/18 24/21 25/5 25/6 25/14 26/1 26/2 26/11 26/12 26/15 26/16 26/21 26/23 27/4 27/5 28/14 28/19 40/25 42/9 47/1 64/17 78/16 106/4 106/20 120/16 123/16 127/23 127/24 128/5 130/18 130/20 131/9 139/13 146/20 146/22 151/11 152/17 166/12 171/10 171/21 174/3 183/20 189/5 190/22
<b>aftermath [2]</b> 119/7 129/6
<b>afternoon [8]</b> 17/10 89/9 105/4 105/5 128/11 149/24 150/8 177/25
<b>afterwards [3]</b> 24/20 25/13 153/1
<b>again [33]</b> 11/8 13/10 25/24 30/13 33/12 35/11 35/20 38/17 38/17 47/15 49/21 50/10 50/21 51/7 51/11 52/18 53/16 55/8 55/21 58/8 59/2 73/8 74/4 74/22 76/3 80/21 81/12 83/13 87/13 99/19 101/8 127/24 178/1
<b>against [12]</b> 11/14 29/13 63/2 116/11 130/19 140/24 141/1 148/7 169/20 170/22 180/2 181/15
<b>age [4]</b> 98/7 154/6 154/10 154/12
<b>agencies [1]</b> 113/5
<b>agency [3]</b> 35/15 150/16 153/3
<b>agenda [1]</b> 110/1
<b>aggressive [1]</b> 4/16
<b>ago [13]</b> 14/13 15/10 15/12 58/8 58/11 58/13 64/11 147/8 147/9 147/10 148/17 148/18 185/14
<b>agree [25]</b> 4/12 4/18 4/19 5/1 5/9 9/13 9/16 12/21 13/1 48/5 48/16 48/21 48/23 71/6 71/11 76/18 83/21 86/2 87/2 120/13 147/4 147/8 147/12 149/1 170/3
<b>agreed [2]</b> 18/9 190/1
<b>agreement [1]</b> 170/3
<b>aground [2]</b> 133/10 133/11



<p><b>A</b></p> <p>athletes... [211] 93/13 93/4 99/5 80/1 93/16 94/3 94/10 94/13 94/19 94/21 95/9 95/10 96/16 98/13 98/22 99/8 99/10 99/23 101/16 102/3 102/7 athletic [4] 75/24 93/20 94/1 95/12 athletically [1] 95/11 athletics [1] 100/8 Atlantic [1] 166/9 attached [1] 102/15 attachment [3] 73/18 83/17 87/16 attachments [1] 188/19 attacked [4] 118/6 129/4 130/6 161/3 attacking [1] 127/9 attained [1] 152/1 attempt [2] 135/7 136/15 attempted [6] 115/11 119/3 120/25 122/3 123/3 138/15 attempting [1] 136/24 attempts [3] 132/7 132/17 148/22 attend [14] 13/23 19/12 20/21 44/15 63/18 70/11 105/25 106/4 106/6 151/7 151/11 153/8 175/20 187/2 attended [5] 41/19 48/11 56/14 122/15 173/8 attending [4] 19/18 49/6 145/25 184/10 attention [4] 116/5 123/13 125/16 127/5 attitude [1] 4/16 attitudes [2] 11/16 11/17 attract [3] 8/19 8/21 145/17 attractive [1] 48/25 attributable [2] 74/14 97/6 attributing [1] 43/18 attrition [37] 73/15 73/21 73/22 75/13 75/14 79/4 79/5 79/24 80/2 82/12 82/17 82/23 83/3 86/13 86/14 86/14 86/17 86/18 86/20 86/22 90/20 90/21 91/23 91/23 92/8 93/8 93/13 97/7 97/11 97/16 97/19 98/19 99/10 99/22 100/11 100/16 101/2 attritions [1] 74/13 Auburn [2] 104/9 104/11 augmentation [1] 35/7 author [2] 84/15 102/21 authorities [1] 136/11 authority [1] 125/22 authorized [1] 23/15 authors [4] 84/5 102/18 154/23 184/4 availability [2] 17/14 76/24 available [9] 76/25 117/23 147/25 148/8 148/10 171/16 188/20 188/21 189/16 average [6] 20/4 20/10 72/3 92/15 95/3 170/6 averages [1] 86/17 averted [1] 129/20 aviation [4] 48/6 82/2 89/16 98/3 award [5] 111/12 111/12 111/13 111/19 155/14 awards [2] 111/17 111/21 aware [5] 29/18 31/5 77/25 134/13 160/19 away [6] 17/10 83/2 119/3 159/18 169/19 171/1</p>	<p>127/25 128/13 128/16 131/2 132/8 134/19 135/9 137/12 139/17 140/16 141/17 141/17 141/17 147/8 148/14 186/8 bald [1] 14/5 ballooned [1] 118/19 Baltimore [3] 1/6 140/1 140/2 Bancroft [1] 173/21 Bangladesh [3] 25/12 35/2 35/17 Barbary [1] 154/7 Barnard [3] 107/2 107/16 107/19 barracks [2] 13/19 124/4 barrier [1] 99/19 bars [3] 88/3 88/4 124/5 base [4] 27/7 118/15 129/10 162/13 based [20] 6/15 12/23 13/7 20/4 24/9 25/8 28/8 59/10 88/18 111/22 112/16 117/23 140/19 140/19 148/20 159/10 166/21 167/23 173/25 186/23 bases [2] 9/3 124/7 basic [2] 29/9 29/11 basically [5] 165/18 166/2 169/10 171/2 180/13 basis [9] 33/13 36/11 101/14 116/3 123/4 123/5 133/18 134/3 139/17 basketball [3] 94/17 94/18 95/2 bastard [2] 37/14 37/15 Bates [3] 58/2 58/16 71/17 battalion [14] 27/10 27/11 35/23 35/25 38/10 38/13 38/18 41/7 41/9 41/11 41/12 48/9 57/6 58/1 battalions [1] 119/20 battle [3] 117/21 121/3 186/25 battles [1] 162/18 BATTO [1] 27/13 Bay [5] 163/17 167/24 167/25 171/22 172/9 be [120] 3/6 4/19 5/2 5/9 5/18 9/17 9/19 13/3 16/15 17/7 18/4 18/10 18/20 23/20 28/12 34/10 34/25 35/13 36/21 37/23 42/8 44/1 45/6 45/24 47/13 48/25 49/10 54/24 55/23 56/9 56/21 59/3 59/6 59/24 61/10 61/24 62/15 66/16 69/11 69/24 70/1 72/17 72/24 77/13 77/22 79/16 79/17 79/17 79/24 80/2 80/8 80/22 81/8 82/21 83/9 85/23 86/1 86/21 88/24 90/19 90/20 90/20 90/22 91/4 92/22 93/21 95/21 95/22 98/21 99/4 99/12 99/14 99/23 103/24 104/12 104/18 104/20 112/5 113/19 117/12 118/6 126/21 127/22 128/11 133/4 137/7 138/19 138/22 140/24 141/1 141/6 148/12 149/3 149/15 149/20 149/23 156/23 157/17 157/20 157/23 164/17 167/22 169/18 171/24 173/12 178/3 180/5 180/6 180/14 180/23 180/23 184/16 184/24 186/19 189/16 190/4 190/8 190/16 190/18 191/2 bear [1] 132/13 bears [1] 68/9 became [2] 140/9 140/13 because [49] 3/25 12/10 16/11 17/13 30/16 39/7 41/9 49/23 51/9 53/12 61/8 63/14 76/13 79/22 79/24 81/15 88/21 88/24 91/9 104/8 104/9 114/23 117/6 117/7 118/13 118/16 121/15 132/3 132/23 134/11 137/2 137/24 141/16 144/1 148/15 160/17 162/4 164/11 164/14 164/25 170/9 170/15 171/13 171/23 173/5 173/18 177/8 180/11 182/8 become [11] 22/20 22/22 23/14 29/18 57/21 109/22 133/10 133/13 136/6 137/19 187/3 becoming [3] 24/14 38/2 92/23 been [72] 3/25 15/13 15/19 17/23 22/16 27/16 27/18 27/20 30/24 37/2 50/7 50/13 50/15 50/16 50/24 51/23 52/10 52/12 53/14 54/3 56/13 57/9 60/24 65/9 66/23 67/16 71/9 71/12 78/15 80/13 86/11 89/5 89/24 90/1 90/3 91/10 92/20 96/20 100/2 100/5 100/17 105/10 108/8 110/6 113/22 120/13 127/11 132/23 133/6 135/20 137/13 138/9 139/5 148/15 163/19 169/5 169/12 169/14 169/15 169/16 169/17 170/21 171/17 177/3 177/6 177/13 183/8 185/13 188/24 188/25 189/24 190/1 before [47] 1/9 18/22 27/16 28/7 40/17 45/2 58/25 59/2 59/24 60/1 60/10 70/5 76/20 77/7 77/21 83/19 89/24 90/7 91/13 92/5 92/20 93/1 93/10 93/12 95/16 95/18 96/11 110/18 115/6 116/2 122/9 137/24 141/14 141/16 145/19 145/21 145/22 150/1 159/14 159/15 159/22 159/25 160/13</p>	<p>160/20 165/20 188/17 191/14 began [7] 23/4 119/25 127/4 128/22 145/6 147/13 147/13 begin [4] 135/25 136/4 142/16 145/23 beginning [4] 105/12 107/16 107/19 158/25 begins [1] 154/5 behalf [7] 1/12 1/16 6/5 6/8 6/10 40/19 103/11 behavior [7] 11/20 30/19 36/24 37/3 38/9 130/10 130/15 behind [2] 67/8 83/12 being [43] 5/6 8/8 10/8 11/18 13/5 29/21 30/10 32/18 38/2 38/8 38/17 38/21 38/22 39/10 52/7 53/1 68/18 70/20 75/7 76/2 76/25 79/21 85/11 101/10 101/11 117/10 119/11 119/19 119/20 120/25 133/7 134/13 134/23 140/7 148/19 149/17 149/22 164/25 166/24 166/24 167/20 170/6 180/13 believe [47] 7/5 7/9 7/13 7/17 10/1 10/5 12/18 13/9 17/15 29/25 32/13 33/24 34/4 34/13 34/16 34/17 35/19 36/7 36/9 41/16 41/16 44/17 45/15 45/14 46/10 49/10 51/15 57/14 62/15 83/11 84/4 86/14 87/6 109/3 110/21 129/15 136/2 136/12 146/18 147/3 149/20 157/22 168/20 170/11 170/14 184/8 187/19 believed [9] 123/21 135/21 139/19 139/23 148/2 148/6 148/9 148/12 174/24 believing [1] 118/6 below [9] 22/7 23/16 62/18 69/11 69/25 71/9 71/12 87/25 88/8 Ben [3] 168/14 169/5 170/11 bench [3] 113/23 157/21 189/5 beneficial [1] 188/19 benefit [2] 67/19 70/3 benefits [1] 140/17 Bengali [1] 35/9 BENNETT [1] 1/9 berthing [2] 167/20 181/4 besides [1] 177/10 best [4] 57/17 83/4 128/3 155/14 Beth [6] 2/11 17/25 104/1 104/25 111/25 112/5 Beth Bailey [4] 17/25 104/1 104/25 112/5 better [9] 7/14 60/7 61/3 76/15 95/9 95/11 95/21 130/23 177/8 between [11] 12/17 12/20 29/15 74/17 100/19 130/11 130/25 159/18 163/19 170/5 173/9 beyond [2] 4/22 129/17 biased [4] 180/4 180/5 180/6 181/18 big [1] 99/5 biggest [2] 165/7 182/6 Bill [1] 164/7 Bill Kelley [1] 164/7 billet [3] 47/22 48/3 49/1 billets [7] 45/16 45/23 46/16 47/13 48/16 48/20 51/1 binder [4] 66/22 71/16 83/12 113/13 Binh [2] 129/2 129/22 bio [3] 29/7 29/8 29/12 biographical [1] 29/10 biography [3] 29/7 29/23 30/8 Birch [28] 2/6 17/23 18/4 18/5 18/8 18/11 18/14 18/15 18/19 19/2 19/8 19/11 19/14 20/5 21/3 30/1 30/3 30/7 39/19 40/15 43/12 44/3 46/15 53/21 54/12 59/12 59/19 60/1 birth [1] 29/9 bit [29] 3/4 19/15 37/12 42/8 42/10 66/20 70/9 70/22 75/6 75/9 78/21 81/13 82/25 83/25 86/24 92/8 93/16 93/23 95/5 95/6 95/13 95/13 127/1 142/7 151/5 151/6 154/22 163/14 170/20 black [114] 7/18 30/4 30/7 32/18 32/23 34/13 68/14 72/14 72/21 72/22 73/2 73/4 85/13 85/21 88/1 88/7 88/8 88/19 88/22 117/15 117/17 117/19 119/12 119/15 120/7 120/23 121/1 122/12 122/15 125/7 125/8 125/8 125/20 129/3 130/5 131/8 133/8 134/22 135/7 135/8 135/10 135/12 135/14 135/14 135/15 135/15 135/18 135/21 135/23 136/1 136/3 136/12 136/19 136/21 137/12 137/17 137/23 138/4 138/14 138/15 138/20 139/4 139/19 139/21 143/19 144/13 145/17 145/20 148/2 148/4 148/9 148/9 154/5 158/13 158/18 158/24 158/25 161/3 161/5 161/6 161/10 161/19 161/21 162/2 162/2 162/3 163/19 163/24 167/1 167/2</p>
<p><b>B</b></p> <p>B-52s [1] 171/17 B-A-I-L-E-Y [1] 104/25 B-E-T-H [1] 104/25 B-I-R-C-H [1] 19/2 BA [1] 106/3 baby [1] 187/4 Bachelor [1] 64/13 back [45] 17/7 17/9 17/10 24/21 25/14 32/2 45/17 50/11 51/11 52/16 52/17 53/8 55/11 57/25 59/24 73/6 73/17 81/17 81/19 82/11 87/16 100/15 102/1 103/19 116/10 119/16 128/16 129/1 134/16 134/21 135/9 147/25 149/13 149/15 161/24 163/18 163/24 164/25 165/22 168/1 168/2 168/3 169/1 178/21 187/12 background [13] 32/23 33/2 33/10 34/13 34/25 35/20 49/12 63/16 89/11 89/16 94/2 105/23 151/5 backgrounds [4] 134/12 134/13 134/14 175/18 bad [4] 11/17 134/23 169/11 184/19 Bahrain [2] 24/19 24/21 Bailey [44] 2/11 17/25 104/1 104/20 104/25 105/4 107/10 107/20 108/8 109/2 110/16 111/25 112/5 112/8 112/10 112/20 113/13 114/6 114/14 115/2 115/16 118/20 119/23 122/6 122/24 124/10 124/20 126/12</p>		



<b>B</b>	<b>black...</b> [24] 168/36 168/17 168/20 170/22 170/22 173/8 173/10 173/15 174/15 175/1 175/14 175/18 175/24 176/20 180/5 180/11 181/2 181/7 181/11 182/20 182/21 183/12 183/17 183/25	<b>call</b> [16] 17/14 18/4 18/7 18/12 23/13 27/13 27/15 29/7 29/8 31/9 35/14 46/25 60/3 60/3 60/5 60/5	<b>77/7</b> 77/12 81/19 81/21 86/20 112/11 113/11 114/23 115/3 115/24 126/17 149/14 155/3 155/12 157/22 166/15 180/22 187/13 189/6
	<b>Black-focused</b> [1] 136/19 <b>Blacks</b> [3] 162/5 180/2 181/15 <b>blank</b> [2] 11/25 12/2 <b>blare</b> [1] 171/2 <b>blind</b> [4] 122/2 122/5 122/10 122/23 <b>blocked</b> [2] 130/21 188/15 <b>blown</b> [1] 158/19 <b>bludgeoning</b> [1] 168/4 <b>blue</b> [20] 75/6 75/22 76/8 76/12 93/16 93/17 93/19 94/3 94/10 94/13 94/19 94/21 95/9 95/10 95/20 96/16 101/16 130/24 163/23 182/19 <b>blue-chip</b> [17] 75/6 75/22 76/8 76/12 93/16 93/17 93/19 94/3 94/10 94/13 94/19 94/21 95/9 95/10 95/20 96/16 101/16 <b>BLUM</b> [1] 1/21 <b>board</b> [17] 43/13 43/15 45/5 53/22 54/14 56/12 56/14 56/19 57/2 57/7 57/9 57/11 57/13 58/1 58/3 96/24 96/25 <b>boards</b> [2] 122/13 122/13 <b>bombed</b> [1] 171/15 <b>bombing</b> [1] 171/12 <b>book</b> [13] 111/19 111/20 113/2 139/8 142/23 143/2 153/22 153/23 153/24 154/5 155/13 155/14 186/23 <b>books</b> [10] 95/4 110/21 111/1 143/8 150/23 153/21 155/6 155/25 156/2 156/4 <b>Boost</b> [6] 175/16 182/8 182/8 182/11 182/11 182/14 <b>boot</b> [3] 13/12 13/23 13/25 <b>both</b> [27] 3/11 22/2 25/2 25/15 26/7 26/9 27/14 28/21 35/21 48/8 64/18 72/2 75/3 89/6 95/14 114/20 116/14 118/22 122/22 124/5 125/14 144/17 157/18 163/24 173/11 175/18 191/12 <b>bottles</b> [1] 130/7 <b>bottom</b> [9] 45/22 46/15 46/17 46/17 46/19 46/20 68/4 73/7 88/19 <b>bound</b> [3] 66/8 66/9 66/13 <b>boycotting</b> [1] 121/14 <b>brain</b> [1] 129/9 <b>branch</b> [2] 120/10 121/21 <b>branches</b> [1] 143/25 <b>break</b> [7] 31/12 80/23 99/9 127/21 127/23 127/24 163/4 <b>breaking</b> [1] 167/14 <b>Brice</b> [1] 84/22 <b>brief</b> [1] 147/20 <b>briefly</b> [6] 24/7 53/22 73/10 89/11 93/15 106/19 <b>brig</b> [1] 167/22 <b>brigade</b> [8] 88/9 173/19 174/1 174/6 174/9 174/13 174/16 174/20 <b>brill</b> [1] 30/10 <b>brill-like</b> [1] 30/10 <b>bring</b> [5] 27/9 63/15 74/25 165/18 185/22 <b>broadcast</b> [1] 118/17 <b>broaden</b> [2] 44/25 49/12 <b>broke</b> [3] 79/2 118/15 124/4 <b>broken</b> [4] 68/22 68/24 82/12 130/7 <b>bronze</b> [1] 23/21 <b>broom</b> [1] 127/10 <b>Brother</b> [1] 33/2 <b>brought</b> [6] 30/22 31/17 134/7 165/3 166/24 167/21 <b>brown</b> [6] 30/10 30/11 30/11 153/22 172/24 174/3 <b>brown-water</b> [1] 153/22 <b>BRUCE</b> [1] 1/21 <b>BUD</b> [1] 37/7 <b>BUD/S</b> [1] 37/7 <b>build</b> [3] 28/17 35/8 144/1 <b>built</b> [1] 33/5 <b>bullet</b> [4] 97/3 97/13 98/10 98/12 <b>bullets</b> [1] 169/13 <b>bulwark</b> [2] 140/24 141/1 <b>bunch</b> [1] 138/13 <b>Bureau</b> [1] 133/6 <b>burned</b> [1] 129/6	<b>called</b> [21] 17/7 18/4 33/2 39/17 59/24 63/21 74/3 81/17 89/6 103/19 120/23 130/12 134/6 143/2 149/13 149/15 149/22 165/16 166/12 175/16 187/12 <b>calling</b> [6] 17/12 17/17 60/16 60/17 63/14 104/5 <b>calls</b> [1] 187/4 <b>came</b> [16] 24/21 25/14 33/4 87/2 93/1 97/20 98/4 125/7 163/13 165/23 167/5 167/25 168/2 168/3 173/15 180/8 <b>CAMERON</b> [1] 1/14 <b>camp</b> [13] 13/12 13/23 14/1 26/3 118/5 127/6 127/7 127/17 128/19 129/1 131/4 163/7 163/8 <b>Camp Lejeune</b> [1] 163/8 <b>campaign</b> [2] 145/16 170/2 <b>campus</b> [6] 65/7 65/11 65/22 70/13 97/22 99/1 <b>can</b> [82] 3/5 3/9 4/7 4/15 9/20 11/3 11/15 11/16 11/23 13/3 18/10 19/10 25/20 28/10 32/2 34/3 34/21 36/20 37/6 37/7 38/22 38/23 38/24 42/25 43/4 43/10 44/1 44/8 44/19 47/5 47/9 47/11 47/21 48/9 48/25 49/25 50/21 51/7 51/25 55/19 57/17 58/22 58/23 59/6 61/10 65/20 68/18 74/22 75/4 75/23 76/2 76/20 77/8 80/8 87/25 89/12 93/24 95/20 96/23 112/6 113/23 129/5 131/20 137/20 137/25 142/6 160/9 160/12 161/9 163/10 164/9 168/20 173/25 175/10 176/11 179/20 181/9 183/15 187/11 187/23 187/24 189/11 <b>can't</b> [22] 37/8 41/24 42/20 47/12 48/7 50/10 52/19 53/19 57/14 80/3 84/22 133/3 133/3 133/12 137/17 137/18 171/24 185/21 185/22 185/25 186/9 186/10 <b>candidate</b> [7] 21/19 43/22 44/11 44/23 56/9 59/7 175/22 <b>candidates</b> [7] 27/14 49/13 55/3 74/21 75/1 82/15 92/20 <b>cannot</b> [2] 77/1 186/8 <b>cap</b> [2] 94/11 117/2 <b>capabilities</b> [2] 10/24 95/17 <b>capacities</b> [1] 109/19 <b>capacity</b> [2] 28/18 35/8 <b>capital</b> [1] 16/22 <b>capitol</b> [1] 35/18 <b>captain</b> [69] 2/6 2/8 17/23 18/4 18/5 18/8 18/11 18/14 18/15 18/19 19/8 19/8 19/14 20/5 21/13 23/9 30/1 30/3 30/7 37/9 39/19 40/15 43/12 44/3 46/15 49/3 53/21 54/12 59/12 59/19 60/1 60/19 62/1 62/3 62/13 62/13 62/14 62/15 62/18 63/4 63/10 63/11 63/13 64/4 66/12 66/19 66/24 68/2 69/21 71/4 71/25 72/17 75/11 77/9 80/20 80/24 81/9 81/12 84/11 84/24 86/25 87/4 87/15 89/9 96/21 100/6 103/11 103/16 136/6 168/6 <b>Captain Birch</b> [24] 18/4 18/5 18/8 18/11 18/14 18/15 18/19 19/8 19/14 20/5 21/13 30/1 30/3 30/7 39/19 40/15 43/12 44/3 46/15 53/21 54/12 59/12 59/19 60/1 <b>Captain Jason</b> [1] 17/23 <b>Captain Timika</b> [1] 84/11 <b>Captain Togo</b> [1] 136/6 <b>Captain Vahsen</b> [27] 62/1 62/3 63/10 63/11 63/13 66/12 66/19 66/24 68/2 69/21 71/4 71/25 72/17 75/11 77/9 80/20 80/24 81/12 84/24 86/25 87/4 87/15 89/9 96/21 100/6 103/11 103/16 <b>captain's</b> [5] 31/9 31/11 167/21 167/23 180/10 <b>care</b> [1] 82/10 <b>career</b> [14] 5/25 6/15 6/16 16/21 22/24 36/23 37/13 38/25 45/4 50/16 53/16 89/12 133/22 142/22 <b>Caribbean</b> [1] 90/6 <b>caricatures</b> [1] 30/12 <b>Carlucci</b> [2] 169/7 169/8 <b>CARMICHAEL</b> [6] 1/18 2/5 3/13 3/17 12/1 17/1 <b>Carnegie</b> [1] 108/6 <b>Carolina</b> [1] 160/25 <b>carrier</b> [5] 165/9 165/10 165/11 169/16 186/25 <b>carriers</b> [4] 16/17 147/5 169/2 170/5 <b>carrot</b> [1] 100/1 <b>case</b> [25] 11/17 42/18 63/15 65/7 68/6	<b>cases</b> [5] 116/25 161/2 165/24 168/4 170/21 <b>casualties</b> [1] 118/8 <b>categories</b> [1] 76/4 <b>category</b> [3] 93/14 165/22 165/23 <b>Category 3</b> [1] 165/22 <b>Category 4</b> [1] 165/23 <b>CATHERINE</b> [1] 1/17 <b>Cathy</b> [1] 84/14 <b>Cathy McGuire</b> [1] 84/14 <b>cats</b> [1] 80/13 <b>Caucasian</b> [6] 68/22 68/23 71/7 71/9 71/12 74/17 <b>Caucus</b> [2] 131/8 133/8 <b>causal</b> [1] 126/16 <b>cause</b> [7] 69/19 70/2 181/7 181/11 181/16 181/19 181/23 <b>caused</b> [7] 144/12 178/11 179/16 181/2 183/12 183/17 183/25 <b>causes</b> [3] 137/8 167/13 172/1 <b>caveat</b> [1] 157/18 <b>CB</b> [1] 162/13 <b>center</b> [14] 105/8 108/4 108/13 108/15 108/19 108/21 109/7 109/23 110/13 120/22 152/19 152/20 152/24 153/2 <b>centered</b> [1] 131/1 <b>centers</b> [1] 108/9 <b>central</b> [3] 26/19 135/6 162/11 <b>century</b> [12] 106/13 121/12 142/5 142/9 143/12 144/12 146/14 146/15 153/17 154/13 178/2 178/5 <b>certain</b> [12] 14/2 42/1 57/14 69/19 74/25 78/14 94/4 113/11 143/25 155/17 156/10 186/10 <b>certainly</b> [34] 16/14 21/19 31/5 32/19 34/19 36/21 38/1 39/7 40/12 41/25 43/10 44/1 44/5 45/4 47/24 48/8 50/17 52/9 52/10 56/18 61/20 69/18 82/5 84/16 93/24 99/20 100/23 113/23 119/14 125/2 126/24 169/16 188/2 189/6 <b>CERTIFICATE</b> [1] 191/25 <b>Certified</b> [1] 192/4 <b>certify</b> [1] 192/6 <b>cetera</b> [2] 34/9 126/3 <b>Chadbourn</b> [1] 164/5 <b>chain</b> [10] 29/21 38/17 41/6 66/16 66/17 167/1 172/7 180/16 180/21 181/23 <b>chair</b> [5] 108/17 109/21 109/22 109/23 109/25 <b>challenge</b> [4] 22/24 70/7 75/6 76/9 <b>challenged</b> [1] 156/23 <b>challenges</b> [4] 7/15 12/19 44/18 104/12 <b>challenging</b> [1] 70/10 <b>Chaminade</b> [1] 106/23 <b>Chaminade University</b> [1] 106/23 <b>chance</b> [4] 63/15 70/14 76/16 118/16 <b>Chancellor</b> [1] 130/8 <b>change</b> [3] 8/22 174/17 182/24 <b>changed</b> [1] 99/17 <b>changes</b> [1] 191/17 <b>changing</b> [1] 49/8 <b>channels</b> [1] 38/19 <b>characteristic</b> [1] 9/16 <b>characteristics</b> [1] 75/2 <b>characterization</b> [1] 13/1 <b>characterized</b> [3] 115/9 123/1 124/2 <b>characterizing</b> [1] 55/12 <b>charge</b> [3] 25/18 25/24 26/6 <b>charged</b> [2] 180/13 180/14 <b>Charles</b> [1] 164/5 <b>Charles Chadbourn</b> [1] 164/5 <b>Charleston</b> [1] 160/24 <b>chart</b> [1] 102/2 <b>cherry</b> [1] 86/23 <b>cherry-picking</b> [1] 86/23 <b>Chicago</b> [12] 106/7 106/20 119/7 119/8 141/23 160/25 161/14 161/14 161/18 161/20 161/24 162/15 <b>chief</b> [18] 26/3 26/18 33/15 33/16 33/18 65/1 65/4 65/12 84/12 89/20 124/3 133/6 150/19 150/24 167/3 167/12 176/25 177/1 <b>children</b> [1] 161/7 <b>China</b> [4] 34/4 34/14 34/18 34/23 <b>chip</b> [17] 75/6 75/22 76/8 76/12 93/16 93/17 93/19 94/3 94/10 94/13 94/19 94/21 95/9 95/10 95/20 96/16 101/16
<b>C</b>	<b>cadets</b> [2] 138/20 145/20 <b>calibrate</b> [1] 132/7 <b>California</b> [2] 118/14 119/8		

choice [4]	38/2 38/2 45/14 89/6	combat [17]	6/19 15/14 23/20 23/21 27/25 28/2 28/5 90/7 90/9 90/11 90/12 117/7 120/16 169/2 200/2	condoned [1]	126/9
choices [1]	69/20	combination [3]	21/17 22/11 46/23	conduct [5]	73/23 90/21 97/11 150/23 155/1
choose [2]	38/25 165/5	combined [2]	21/18 110/12	conduct-honor [1]	73/23
chooses [1]	81/23	come [30]	18/14 18/19 28/19 38/23 45/12 46/15 48/24 49/13 70/18 70/23 70/25 75/4 75/6 76/9 77/11 95/18 98/20 98/21 101/8 101/9 104/20 114/20 122/9 132/13 135/3 140/23 149/23 166/14 167/10 184/19	conduct/honor [1]	97/11
chopping [1]	160/9	comes [2]	71/22 137/16	conducted [6]	110/17 146/6 183/11 183/16 183/24 184/3
chose [5]	34/6 37/24 135/25 136/4 136/14	comfortable [1]	30/21	conducting [1]	154/25
CHRIS [1]	1/19	coming [5]	94/25 131/21 138/7 163/18 163/24	Confederate [2]	125/22 126/5
Christie [1]	56/16	command [36]	25/7 25/9 25/23 26/23 27/2 27/6 29/21 32/15 32/16 32/18 35/1 35/3 35/6 38/17 41/6 66/16 66/17 89/17 110/12 110/14 126/6 126/7 132/23 133/24 150/12 150/15 150/17 150/22 153/4 164/6 167/2 172/7 180/17 180/21 181/23 186/24	conference [2]	110/15 192/10
Christmas [1]	171/12	commandant [4]	7/24 8/7 83/16 129/8	conferences [1]	153/8
chronology [1]	156/2	Commandant's [1]	8/14	confident [2]	30/21 188/6
church [1]	61/7	commanded [3]	16/18 26/18 121/1	confined [1]	119/19
circulate [1]	135/24	commander [11]	24/15 24/15 24/22 24/23 24/24 32/17 32/19 126/5 130/8 168/10 169/8	confirm [2]	3/18 58/21
circumstance [1]	9/17	commanders [1]	134/17	conflict [27]	115/4 116/1 118/11 123/6 123/9 125/3 126/23 127/16 129/12 131/1 132/1 133/17 134/11 139/6 139/11 140/11 145/14 145/15 146/16 146/19 146/22 146/24 146/25 148/3 148/4 148/19 148/25
circumstances [1]	80/10	commanding [7]	16/16 16/22 25/23 26/25 29/19 30/15 32/23	conformance [1]	192/10
citations [1]	23/22	commands [3]	26/19 132/25 150/25	confront [1]	138/2
cities [2]	130/3 179/4	commendations [1]	23/20	confrontation [1]	130/20
citizenship [2]	118/25 140/8	comment [1]	83/20	confrontations [1]	124/5
city [2]	35/18 151/8	comments [1]	39/16	confronted [3]	129/18 142/24 163/23
civil [2]	1/4 132/21	commission [5]	45/13 80/8 88/22 175/21 176/8	confronting [1]	123/15
civilian [9]	13/15 33/1 34/12 109/11 117/1 123/22 125/24 137/18 185/8	commissioned [7]	23/24 24/1 45/9 52/11 64/15 90/20 158/24	confused [1]	48/19
claiming [1]	146/15	commissioning [4]	50/18 88/20 158/24 176/13	confusion [2]	17/19 189/2
clarify [4]	20/7 45/25 46/3 146/12	commissions [3]	176/15 176/15 176/16	Congratulations [2]	42/4 64/10
clarity [1]	18/15	commitment [3]	76/21 79/3 79/9	Congress [6]	127/16 131/5 131/7 131/11 131/17 171/4
class [46]	19/21 36/5 36/6 42/13 42/16 45/22 64/2 64/3 68/21 69/7 70/6 71/18 73/16 73/21 73/22 75/9 76/3 78/10 78/13 78/19 78/20 78/22 79/22 80/9 81/15 85/3 88/19 91/9 91/17 91/19 91/21 91/22 92/14 93/2 94/9 94/11 97/5 97/14 97/16 97/20 98/12 100/10 101/21 102/4 167/3 171/20	committal [1]	78/2	congressional [3]	127/5 131/8 133/8
classes [2]	63/24 95/7	committed [2]	95/2 136/25	Congressman [1]	121/9
classmates [2]	42/20 42/22	committee [9]	109/25 110/4 130/21 130/24 131/3 131/4 131/11 134/21 137/14	Congressman Adam [1]	121/9
classroom [3]	22/1 46/24 108/9	common [2]	143/8 178/21	conjunction [1]	108/24
classwork [1]	101/17	commonly [1]	108/22	connect [1]	30/16
Clayton [1]	121/10	communicate [3]	16/2 110/1 170/16	connected [1]	10/7
clean [1]	35/12	communication [2]	16/12 134/11	connections [1]	33/11
cleaning [1]	160/11	communications [1]	26/8	CONNOLLY [9]	1/13 2/14 17/2 156/20 177/22 177/24 179/9 185/3 187/8
clear [8]	18/9 37/15 54/24 82/21 138/18 189/1 189/14 189/22	communism [1]	121/17	consequence [1]	171/6
clerks [2]	17/22 188/21	communities [7]	22/18 34/8 46/22 47/2 48/10 82/4 161/3	conservative [1]	14/18
climate [3]	166/20 180/1 181/14	community [21]	5/1 22/25 24/1 36/22 36/22 38/3 38/5 47/6 47/9 48/5 48/25 81/23 82/5 88/20 88/23 96/5 96/6 106/24 119/19 161/6 161/6	consider [6]	58/23 69/11 69/24 73/2 80/15 83/1
close [1]	80/14	company [1]	95/4	considerable [1]	188/23
closely [2]	33/12 161/18	compared [2]	94/20 122/9	consideration [3]	51/9 51/24 94/1
closer [1]	19/15	compete [3]	93/25 99/2 101/14	considerations [1]	44/21
closing [2]	189/17 190/4	competes [1]	92/13	considered [10]	44/14 51/13 53/15 54/22 55/16 55/17 56/2 56/8 93/22 162/4
closings [1]	188/7	competitive [3]	98/14 98/18 108/1	considering [3]	44/23 45/6 49/4
clothes [1]	13/15	compile [1]	80/11	considers [1]	72/23
Cloud [2]	168/14 169/5	complaint [1]	157/11	consistent [1]	113/19
Cloud's [1]	170/11	complete [1]	163/23	consists [1]	155/6
clustering [1]	88/24	completely [3]	130/17 137/15 165/25	constant [1]	134/25
CNO [4]	171/5 176/24 176/25 183/20	complicated [1]	186/7	Constellation [11]	129/21 147/5 165/9 166/8 167/10 170/18 170/19 170/20 171/7 171/9 172/2
CNOs [2]	176/18 176/22	compliments [1]	191/10	constitute [1]	94/12
co [1]	110/22	components [1]	86/15	contacted [2]	42/1 92/21
co-edited [1]	110/22	comprised [1]	35/14	contain [1]	157/12
coach [4]	41/25 92/21 92/21 93/19	comprising [1]	36/6	contains [1]	92/14
coal [1]	160/4	computed [1]	72/3	content [1]	102/25
coaling [1]	160/4	computer [2]	1/24 16/2	contested [1]	120/12
Coast [3]	24/9 25/2 162/13	Computer-aided [1]	1/24	context [1]	34/17
Coat [1]	24/11	concede [1]	52/13	Continental [1]	26/9
Code [2]	31/12 180/8	concentration [1]	26/9	contingency [1]	15/8
cohesion [3]	4/7 39/20 121/2	concept [1]	95/15	contingent [1]	15/12
cohesive [1]	6/23	concern [14]	9/22 9/25 10/4 10/19 10/22 11/5 11/9 12/6 12/12 12/22 125/12 129/25 130/1 132/5	continue [5]	44/8 81/7 114/25 123/23 128/12
collaborative [1]	6/23	concerned [11]	121/4 121/6 121/8 130/17 131/17 135/17 136/18 137/1 137/8 137/9 137/13	continued [3]	1/9 120/15 161/11
colleague [3]	68/8 156/4 164/6	concerns [1]	84/1	continuing [1]	130/17
colleagues [3]	12/25 13/8 41/11	concluded [2]	8/16 127/17	continuity [1]	65/25
collection [1]	66/21	concludes [1]	17/8	contradiction [1]	138/20
college [21]	19/12 63/18 99/12 105/25 106/4 106/24 107/2 110/11 110/12 110/12 151/7 151/8 151/9 151/11 164/5 173/17 175/19 175/20 176/4 176/8 182/9	conclusion [2]	88/5 114/21	contribute [3]	97/18 98/18 99/22
colleges [4]	78/21 122/15 138/14 175/14	conclusions [3]	87/2 113/11 190/5	contributed [8]	97/11 101/18 126/24 135/22 158/14 158/19 166/19 175/10
Collette [3]	163/17 164/1 164/1	conditions [4]	119/16 140/8 159/24 161/10	contributor [1]	39/8
colonel [18]	2/5 3/6 3/19 4/1 4/1 4/2 4/6 5/13 5/17 5/25 7/23 8/6 14/11 17/5 17/23 62/14 124/14 124/21			control [6]	126/2 126/5 129/4 129/7 130/12 134/5
Colonel Andy Solgere [1]	5/13			convened [1]	130/24
Colonel Dakota Wood [1]	124/21			conventions [2]	142/5 142/8
Colonel Solgere [1]	5/17			conversation [2]	140/10 140/14
Colonel Wood [2]	17/23 124/14			conversations [4]	30/20 33/3 36/17 119/5
Colonel Woods [1]	17/5			conversely [1]	139/23
colonize [1]	39/18			converted [1]	14/25
color [9]	29/10 29/10 30/10 68/17 122/1 122/2 122/5 122/10 122/23			convicted [1]	119/17
color-blind [4]	122/2 122/5 122/10 122/23			convince [1]	170/17
colored [1]	23/11			convinced [1]	9/6
Columbia [6]	107/3 151/8 151/9 151/14 151/16 152/3			Conyers [1]	173/5
				cookies [1]	37/10
				cooperatively [1]	189/24

coordinate [2]	65/6 65/10 189/20	Cross-talk [1]	51/19	demonstrative [5]	114/6 114/10 114/19
coordination [1]	267/8	Crown [1]	122/20	158/1 158/5	
copy [2]	53/24 54/5	CRR [2]	1/25 192/16	demonstrations [10]	10/11 10/13 10/15 11/23
core [5]	22/2 29/13 34/18 38/24 175/13	cruise [1]	15/18	denial [1]	145/3
corporal [1]	127/11	cruiser [1]	186/25	denied [2]	117/11 118/24
corporate [1]	137/17	culminating [2]	89/17 145/9	dentist [2]	180/22 180/23
corps [59]	5/18 5/25 6/3 6/5 7/2 7/6 7/24 8/7 8/10 8/21 9/7 9/15 13/12 13/23 13/25 14/10 14/23 15/12 15/14 27/15 36/13 39/20 39/22 40/1 96/5 98/2 116/22 117/14 120/6 127/6 127/18 128/24 134/20 136/10 147/20 158/14 158/19 159/1 159/5 160/13 160/14 160/17 160/20 162/23 162/24 163/3 174/22 175/1 175/11 176/3 176/9 176/10 176/12 176/20 177/11 177/19 183/14 183/18 184/2	cultural [1]	122/20	denying [1]	117/3
correct [221]		culture [3]	8/22 9/17 106/3	depart [1]	75/16
correctly [2]	55/12 60/25	current [6]	27/9 35/23 38/10 65/18 105/6 107/8	department [21]	6/10 35/15 66/13 69/5 108/17 109/3 109/12 110/5 112/25 113/4 121/20 131/24 132/5 134/4 135/1 136/14 146/3 182/23 185/9 185/9 185/24
correlation [1]	83/7	currently [4]	6/3 23/1 23/6 150/11	departments [2]	131/25 135/2
could [71]	7/17 7/21 10/3 11/8 21/16 21/25 22/10 23/11 23/17 24/7 28/12 29/2 29/6 31/11 32/14 33/25 35/4 35/8 39/14 43/1 53/7 75/12 75/15 76/16 88/24 90/19 90/20 90/20 90/22 90/24 92/7 92/9 92/17 93/17 99/18 100/2 106/19 120/18 123/19 124/16 124/17 127/2 130/22 132/13 138/5 138/6 150/9 152/13 153/15 153/19 154/4 154/10 154/17 154/24 158/22 159/13 159/24 160/6 160/22 161/16 162/22 163/16 164/23 167/22 167/22 169/20 176/2 176/24 180/14 182/9 188/7	cv [1]	1/5	departs [1]	75/16
couldn't [12]	16/9 37/4 49/16 70/13 70/19 70/22 100/1 101/5 101/13 138/6 173/18 173/20	cycle [1]	25/25	depends [1]	45/24
council [2]	108/2 180/24	D			
councils [5]	166/25 172/5 180/16 180/19 181/22	D-A-K-O-T-A [1]	3/12	depicts [1]	76/3
counsel [6]	66/2 66/3 66/3 102/15 114/19 114/21	D.C [1]	160/25	deploy [2]	24/25 27/3
Counselor [2]	48/19 53/5	daily [3]	33/13 36/11 122/22	deployed [11]	15/7 27/16 27/18 27/20 27/21 28/21 32/8 32/17 89/24 90/1 90/3
counted [1]	135/13	Dakota [3]	2/5 3/12 124/21	deploying [1]	32/21
counterparts [1]	34/2	damage [1]	129/9	deployment [3]	25/6 29/8 32/7
countries [3]	28/5 34/3 35/18	damaged [1]	169/15	deployments [5]	28/19 32/5 52/11 53/18 90/10
country [12]	34/18 35/13 35/14 40/21 41/25 59/21 103/13 108/6 160/24 173/16 178/4 178/15	dangerous [1]	162/4	deposed [2]	68/6 68/8
couple [2]	65/24 69/2	Darrell [1]	150/10	deposition [10]	10/11 10/13 10/15 11/23 41/1 41/2 68/13 85/7 147/2 177/25
course [7]	35/16 37/8 53/23 136/7 160/11 162/17 176/5	dash [1]	69/3	depth [1]	130/17
courses [14]	22/2 22/12 106/12 106/15 106/17 106/23 107/11 107/15 107/17 134/18 142/21 152/7 152/9 152/11	dashboard [1]	73/6	deputy [2]	25/23 83/16
coursework [1]	22/2	dashed [3]	79/21 80/1 80/17	derivation [1]	88/16
court [40]	1/1 52/15 53/7 61/23 63/17 65/20 67/16 68/18 70/5 71/25 73/9 73/10 73/10 74/4 76/2 77/3 81/2 81/5 82/21 83/13 83/25 86/8 113/20 114/7 114/15 114/18 115/8 115/13 119/17 128/4 128/6 128/9 158/2 158/11 158/17 158/22 166/22 191/21 191/23 192/5	data [26]	16/13 29/11 66/21 71/22 79/21 79/23 80/3 80/11 82/14 82/21 82/24 84/16 84/25 85/1 85/3 86/23 87/5 87/6 87/7 87/9 87/24 88/5 88/15 88/16 103/3 132/7	derived [1]	6/16
Court's [3]	67/19 70/3 77/3	date [2]	8/2 29/9	derogatory [1]	37/19
court-martialed [1]	119/17	dated [2]	79/20 192/12	descent [1]	38/15
court-martials [1]	166/22	David [2]	83/14 83/15	describe [29]	29/2 35/4 65/20 83/25 89/12 96/23 112/13 114/17 115/7 115/12 120/18 123/19 153/19 154/4 154/10 154/17 154/24 155/23 158/11 158/17 158/22 159/13 159/24 160/12 161/9 162/22 163/10 163/16 175/10
courtroom [1]	62/16	day [8]	1/3 25/18 25/18 26/6 26/6 95/2 126/4 192/12	described [8]	13/3 33/11 37/17 96/17 113/7 113/8 116/17 162/8
courtship [3]	142/4 142/5 142/8	DD2 [1]	114/10	describing [1]	172/2
covered [1]	85/1	DD3 [1]	158/5	desegregate [1]	120/5
coveted [3]	48/17 48/21 49/1	de [1]	26/3	desegregated [1]	123/16
COVID [16]	37/21 70/8 72/5 77/16 77/20 79/2 79/8 93/6 93/10 97/14 97/18 97/20 97/22 99/4 100/23 101/2	deal [3]	119/17 123/13 125/15	desegregation [4]	120/11 120/13 120/16 121/19
COVID-19 [4]	93/6 93/10 97/14 97/18	dealt [1]	38/7	designated [1]	120/7
create [4]	136/24 138/13 186/3 186/4	dear [1]	34/21	designations [1]	122/3
created [5]	105/14 121/1 134/6 135/24 180/19	dearth [7]	135/9 135/11 135/15 135/15 136/21 136/21 137/23	designed [2]	170/2 174/19
creating [1]	9/4	death [1]	37/21	desire [1]	142/5
credentials [1]	75/1	deaths [1]	118/8	desires [1]	122/20
crew [2]	15/19 163/17	debate [1]	118/25	despite [4]	117/8 117/16 138/8 138/10
crews [1]	180/11	debated [1]	118/23	destroyer [2]	163/17 186/24
crimes [1]	131/21	decade [2]	186/17 186/18	destructive [1]	31/16
crisis [9]	26/19 115/9 123/1 123/14 131/16 132/11 136/16 138/25 142/24	decades [3]	112/16 144/16 186/15	detractment [2]	168/10 168/24
critical [2]	171/11 171/12	December [2]	80/12 80/19	detail [3]	39/14 68/24 151/6
criticisms [1]	87/1	decide [1]	81/24	determinative [1]	81/18
crop [1]	164/16	decided [4]	75/18 77/21 134/5 170/24	determine [4]	47/3 58/4 59/7 167/12
cross [16]	2/5 2/7 2/9 2/12 2/14 3/16 40/10 40/13 41/25 51/19 89/4 89/7 141/7 141/8 177/22 177/23	deciding [5]	4/13 44/14 54/13 55/3 56/8	determines [1]	133/21
cross-country [1]	41/25	decision [4]	52/23 53/2 77/14 77/18	detrimental [1]	49/10
cross-examination [4]	40/10 89/4 141/7	decisions [3]	65/9 137/24 148/15	develop [6]	8/19 8/21 28/17 34/23 35/8 146/4
		deck [3]	160/3 169/7 177/10	developed [2]	95/17 146/1
		decks [2]	160/8 170/23	developing [1]	96/12
		declaration [8]	157/2 157/6 157/8 157/12 183/4 184/9 184/15 184/23	Development [1]	35/16
		decrease [7]	49/6 49/15 49/19 97/5 183/12 183/17 184/1	devices [1]	16/1
		decreased [1]	139/21	devote [1]	75/8
		dedication [1]	5/1	did [182]	4/25 11/1 15/18 19/12 20/17 20/21 20/22 20/23 20/25 21/3 21/4 21/5 21/7 21/20 22/4 22/14 22/18 22/22 23/3 24/12 24/17 24/20 24/23 25/1 25/5 25/13 26/1 26/5 26/11 26/15 26/21 26/25 27/4 27/8 28/2 28/5 29/14 29/18 30/17 30/18 30/20 30/20 31/14 32/5 32/23 33/4 35/4 37/19 37/25 38/16 38/20 41/1 41/2 41/15 41/22 42/2 42/3 43/3 55/13 55/16 57/19 58/8 61/4 62/9 62/25 63/1 63/5 63/18 63/18 63/25 70/14 77/6 77/10 77/16 77/19 78/14 79/10 81/15 85/17 86/5 89/22 93/6 97/18 97/25 98/18 99/22 101/2 102/23 102/25 103/3 105/25 106/2 106/4 106/6 106/8 106/12 106/15 106/17 109/6 109/22 111/4 111/5 111/6 112/10 112/12 112/20 112/22 113/3 113/10 116/17 116/19 117/25 118/2 118/20 119/23 121/18 121/20 124/10 126/12 131/5 131/18 132/9 132/20 133/25 138/3 138/24 140/16 141/25 142/16 142/19 143/1 145/23 146/23 151/7 151/9 151/10 151/11 151/13 151/16 151/20 151/21 151/24 152/7 152/9 152/11 152/17 152/20 152/23 153/1 156/9 157/6 160/17 161/4
		defined [5]	12/9 12/9 28/8 153/15 155/3		
		definitely [7]	21/22 22/24 32/20 35/19 37/4 43/7 139/1		
		degree [11]	21/7 21/8 26/13 48/14 106/2 151/9 151/16 151/20 151/24 152/1 152/3		
		degrees [3]	64/12 106/8 152/1		
		deliver [1]	111/14		
		demanding [1]	96/6		
		democracy [2]	116/12 121/16		
		demographic [3]	68/25 69/7 69/15		
		demographics [1]	69/14		
		demonstrated [3]	5/17 180/1 181/14		



<b>D</b>	<b>DIVISION [2]</b> 1/2 98/23	<b>dramatic [2]</b> 117/8 137/23
<b>did...</b> [29] 161/24 162/7 163/15 164/19 165/21 165/21 165/21 165/25 167/6 167/24 168/20 171/7 171/9 172/10 172/13 172/16 172/20 173/19 174/1 174/6 174/9 174/12 182/19 182/24 190/17 191/13 191/14 191/15 191/17	<b>Division I [1]</b> 98/23	<b>draw [2]</b> 137/18 138/15
<b>didn't [19]</b> 16/4 42/2 49/10 50/8 62/23 62/24 84/15 87/4 87/7 101/13 122/19 132/22 134/12 136/7 148/12 148/14 170/25 173/6 173/6	<b>do [8]</b> 8/24 9/5 9/8 9/9 9/12 9/13 9/13 10/10 10/14 10/19 12/6 12/21 13/24 16/15 17/15 20/25 21/13 21/15 21/23 21/24 22/8 22/9 24/12 24/17 24/20 24/23 25/5 25/13 25/17 26/1 26/5 26/11 26/15 26/21 26/25 27/4 27/8 27/11 27/11 27/23 27/25 28/1 28/8 33/17 34/13 34/15 34/16 35/25 36/2 36/7 36/10 41/11 41/15 42/11 42/25 43/4 44/5 45/22 46/15 47/3 48/5 50/3 52/6 53/3 54/4 55/4 55/8 56/9 56/16 56/23 57/4 57/5 57/17 58/3 58/5 60/5 63/16 65/25 66/24 67/2 68/14 68/16 70/19 70/20 71/20 71/24 72/19 73/13 74/6 74/20 75/9 79/2 80/4 80/15 81/19 82/4 83/4 83/23 85/4 85/9 85/24 87/2 87/22 88/13 88/15 90/21 91/15 92/22 94/3 94/12 94/19 96/16 96/21 97/8 97/10 97/13 98/1 98/16 99/1 99/4 100/6 100/9 100/10 100/14 100/21 100/23 100/25 101/13 102/2 102/6 102/9 102/14 102/18 102/18 108/19 108/19 109/9 109/25 109/25 114/14 128/3 131/18 132/9 137/25 138/3 138/5 138/6 141/17 141/17 142/21 146/25 148/22 150/11 152/17 152/20 153/1 153/5 153/7 153/13 154/1 154/3 157/2 158/8 162/5 164/2 167/24 170/11 170/14 170/24 182/3 186/6 188/4 188/7 189/7 189/20 190/10 190/18 192/6	<b>drawn [2]</b> 137/23 132/25
<b>died [1]</b> 127/13	<b>dock [1]</b> 165/9	<b>dream [1]</b> 132/3
<b>Diego [1]</b> 171/1	<b>Doctrine [1]</b> 110/14	<b>dress [1]</b> 163/22
<b>difference [6]</b> 12/17 83/2 138/25 139/1 140/23 148/10	<b>document [20]</b> 54/5 57/18 59/11 67/8 71/17 73/6 96/21 96/23 96/24 98/11 100/6 102/1 102/14 102/17 102/21 102/23 103/1 103/3 131/18 189/25	<b>drink [1]</b> 167/25
<b>differences [1]</b> 85/11	<b>document's [1]</b> 67/15	<b>driving [2]</b> 70/25 71/1
<b>different [36]</b> 23/19 23/22 24/8 28/18 30/11 31/25 33/3 34/3 34/7 34/9 34/9 34/10 34/12 35/12 35/14 35/17 42/23 42/25 43/4 43/7 43/17 44/18 44/24 44/25 46/23 47/2 47/18 53/19 56/10 72/1 73/23 76/4 81/25 122/19 135/5 170/20	<b>documented [1]</b> 132/4	<b>drop [1]</b> 77/21
<b>differently [1]</b> 11/15	<b>documents [8]</b> 66/25 112/24 155/3 155/4 156/5 167/11 167/12 188/23	<b>dropoff [1]</b> 70/4
<b>differing [1]</b> 43/10	<b>DoD [4]</b> 8/3 69/3 99/24 150/25	<b>dropped [2]</b> 78/16 79/8
<b>difficult [2]</b> 60/23 144/8	<b>does [19]</b> 8/2 25/17 25/21 31/21 33/16 58/3 69/10 72/5 74/23 82/2 82/5 90/19 91/25 109/9 157/12 160/7 169/18 169/23 186/14	<b>dropping [1]</b> 79/6
<b>difficulty [1]</b> 88/20	<b>doesn't [3]</b> 53/9 69/16 186/7	<b>drops [1]</b> 69/18
<b>dig [1]</b> 115/24	<b>dogs [1]</b> 80/13	<b>due [6]</b> 12/19 75/7 86/18 89/1 94/1 149/16
<b>Diplomacy [1]</b> 108/14	<b>doing [11]</b> 28/8 37/10 66/20 70/19 79/1 97/1 101/17 134/3 136/25 188/1 190/14	<b>during [112]</b> 10/13 21/21 22/5 22/15 24/15 25/8 28/3 28/24 29/15 32/9 32/11 33/22 34/14 35/4 35/6 35/19 36/23 37/13 39/15 47/1 52/19 70/7 70/16 70/18 70/21 73/8 79/8 80/9 90/10 97/20 97/20 98/14 99/21 101/4 107/4 115/10 116/4 116/18 116/20 116/24 117/25 120/19 120/20 121/5 123/2 123/6 124/22 126/13 127/5 128/20 132/9 138/24 140/4 143/12 143/17 143/23 144/4 145/4 145/12 146/1 147/14 148/24 153/20 153/22 153/24 154/6 158/15 158/20 159/17 160/23 161/1 161/10 161/11 162/8 162/23 162/24 163/3 163/12 163/19 164/8 164/12 164/18 167/15 169/1 172/10 172/13 172/16 173/22 174/2 174/7 174/10 174/13 174/22 176/5 176/6 178/8 178/14 178/16 178/17 178/23 179/3 179/6 179/13 179/18 179/22 180/15 181/17 181/21 181/24 183/2 183/3 183/10
<b>dire [3]</b> 112/2 112/4 156/19	<b>domestic [2]</b> 158/16 158/21	<b>duties [1]</b> 35/7
<b>direct [14]</b> 2/7 2/9 2/11 2/13 19/6 43/25 44/2 45/10 61/21 93/20 104/18 105/2 137/25 150/6	<b>dominated [2]</b> 125/21 136/11	<b>duty [8]</b> 8/10 23/6 38/4 64/20 64/25 84/20 89/22 169/2
<b>directed [5]</b> 11/6 11/10 12/23 13/2 36/24	<b>don't [65]</b> 3/10 11/7 11/11 13/1 13/25 18/22 19/15 29/25 34/18 34/19 39/2 42/22 47/20 49/5 49/14 49/16 49/19 49/22 50/3 50/5 51/8 52/22 53/1 53/5 53/12 55/10 56/17 57/15 58/6 61/25 63/3 63/22 75/19 78/25 80/3 80/25 82/3 82/8 83/20 84/22 84/23 86/10 88/15 88/16 91/3 91/3 98/4 98/5 98/25 104/23 113/20 126/4 133/2 136/2 136/12 146/21 147/3 147/12 149/5 149/6 149/14 150/1 168/20 189/2 189/8	<b>DX20 [1]</b> 7/21
<b>directive [4]</b> 7/23 8/2 8/3 8/13	<b>done [14]</b> 41/15 53/14 60/6 67/4 113/2 125/1 153/19 154/4 154/6 154/17 169/10 177/8 177/10 191/14	<b>dying [1]</b> 117/10
<b>directives [2]</b> 66/9 66/13	<b>donned [1]</b> 163/22	<b>dynamics [1]</b> 121/18
<b>directly [2]</b> 104/23 124/12	<b>doodoo [1]</b> 30/11	
<b>director [5]</b> 65/19 105/8 108/14 108/15 108/19	<b>door [1]</b> 94/25	<b>E</b>
<b>directors [1]</b> 100/8	<b>doubling [1]</b> 97/15	<b>each [15]</b> 9/6 9/14 25/3 25/4 61/8 69/6 72/2 76/10 86/15 108/23 134/12 135/2 135/2 166/12 166/14
<b>disadvantage [1]</b> 75/10	<b>doubt [3]</b> 56/20 88/15 88/17	<b>Eagle [1]</b> 104/9
<b>disagree [2]</b> 9/10 9/12	<b>down [20]</b> 9/20 11/3 17/5 31/17 49/17 59/20 71/1 82/12 88/8 99/9 167/14 168/9 168/11 168/18 168/21 168/21 170/17 170/25 173/21 187/11	<b>earlier [15]</b> 52/1 54/12 55/2 55/19 56/7 56/13 63/20 74/9 74/18 76/8 88/18 113/19 164/8 165/15 183/7
<b>disciplinary [5]</b> 166/21 170/21 172/5 180/4 181/19	<b>downright [1]</b> 120/4	<b>early [11]</b> 37/7 41/18 134/2 135/1 135/25 137/22 142/9 146/18 154/13 164/25 177/14
<b>discipline [3]</b> 129/20 131/12 131/12	<b>dozen [1]</b> 80/5	<b>earn [5]</b> 106/2 106/8 151/9 151/16 151/20
<b>disciplined [1]</b> 166/24	<b>Dr. [18]</b> 104/20 109/2 115/16 124/1 128/13 135/9 141/17 149/12 150/8 156/13 157/2 158/1 158/8 158/12 160/6 177/25 179/8 179/13	<b>earned [2]</b> 21/8 48/15
<b>disciplines [1]</b> 105/16	<b>Dr. Bailey [7]</b> 104/20 109/2 115/16 128/13 135/9 141/17 149/12	<b>ease [1]</b> 145/11
<b>discount [1]</b> 157/20	<b>Dr. King [1]</b> 179/8	<b>easier [1]</b> 67/12
<b>discovered [1]</b> 100/15	<b>Dr. Martin [2]</b> 124/1 179/13	<b>easily [2]</b> 155/7 186/18
<b>discriminated [1]</b> 116/11	<b>Dr. Sherwood [8]</b> 150/8 156/13 157/2 158/1 158/8 158/12 160/6 177/25	<b>East [5]</b> 24/9 25/2 27/21 32/21 90/5
<b>discrimination [21]</b> 115/5 116/1 116/14 116/14 116/17 118/1 119/2 120/15 120/18 121/4 125/17 143/13 143/16 143/22 144/11 145/11 166/20 172/4 179/22 181/6 181/10	<b>draw [1]</b> 122/1	<b>East African [1]</b> 32/21
<b>discriminatory [4]</b> 30/19 36/24 37/3 38/9	<b>draft [12]</b> 116/25 126/12 126/14 126/24 164/12 164/12 164/13 164/13 164/18 164/25 165/13 165/21	<b>East Coast-based [1]</b> 24/9
<b>discuss [11]</b> 17/6 30/18 59/23 80/25 103/17 110/3 110/3 127/2 127/25 147/12 187/11	<b>drafted [1]</b> 126/20	<b>economic [1]</b> 9/17
<b>discussed [14]</b> 13/12 42/10 52/6 52/9 72/5 75/12 85/6 92/8 131/3 140/6 168/18 181/1 182/1 182/17		<b>edit [1]</b> 102/23
<b>discussing [4]</b> 42/17 74/8 76/14 102/14		<b>edited [2]</b> 110/22 110/22
<b>discussion [2]</b> 13/6 63/20		<b>edits [2]</b> 29/23 30/7
<b>discussions [3]</b> 12/24 13/8 34/11		<b>education [8]</b> 29/10 74/14 109/13 110/4 139/3 165/24 166/1 173/17
<b>display [2]</b> 34/22 35/20		<b>educational [2]</b> 105/23 151/5
<b>disposal [2]</b> 96/6 148/8		<b>educationally [2]</b> 175/17 182/14
<b>disproportionate [1]</b> 94/13		<b>EDWARD [1]</b> 1/21
<b>dispute [2]</b> 189/11 189/13		<b>effect [9]</b> 37/25 38/20 39/16 79/1 121/2 146/23 161/4 162/7 171/7
<b>disrespect [1]</b> 62/12		<b>effective [4]</b> 36/8 74/15 121/22 122/6
<b>disruptive [2]</b> 31/15 123/6		<b>effectively [1]</b> 12/16
<b>dissemination [1]</b> 20/9		<b>effectiveness [5]</b> 6/19 7/11 39/23 96/24 172/14
<b>dissertation [3]</b> 142/3 142/4 152/4		<b>efficiency [6]</b> 7/10 115/5 116/2 116/9 116/18 133/20
<b>dissuade [1]</b> 33/7		<b>effort [7]</b> 125/16 134/2 145/24 174/21 175/23 182/5 182/18
<b>dissuader [1]</b> 99/15		<b>efforts [7]</b> 117/17 139/3 140/22 145/25 175/10 182/2 182/6
<b>distance [2]</b> 42/6 42/6		<b>egregiously [1]</b> 90/21
<b>distinctly [1]</b> 86/12		<b>eight [4]</b> 8/10 16/17 110/22 118/12
<b>distinguished [7]</b> 105/7 105/10 105/13 105/15 107/9 111/17 111/19		<b>eight years [1]</b> 8/10
<b>distracting [1]</b> 38/5		<b>eighth [1]</b> 165/24
<b>distressing [1]</b> 42/9		<b>eighth-grade [1]</b> 165/24
<b>DISTRICT [4]</b> 1/1 1/1 192/5 192/6		<b>either [17]</b> 11/17 13/3 16/18 17/23 37/8 75/13 78/1 90/10 110/22 113/24 133/14 139/13 141/19 146/14 164/14 175/21 176/8
<b>distrust [1]</b> 121/1		<b>element [3]</b> 26/19 47/9 132/18
<b>disturbing [1]</b> 41/3		<b>elevate [1]</b> 42/8
<b>ditching [1]</b> 13/15		<b>Eliott [1]</b> 111/13
<b>diverse [2]</b> 34/7 134/13		
<b>diversity [23]</b> 6/18 6/22 7/1 7/6 7/13 8/14 9/4 36/13 39/19 39/22 39/25 40/3 40/5 42/17 58/24 84/12 115/14 139/15 139/23 140/17 140/21 140/22 176/12		
<b>diverted [1]</b> 116/5		
<b>divided [2]</b> 85/16 85/19		



**E**

else [4] 63/3 84/13 191/4 192/5  
email [7] 67/2 79/20 83/13 87/1 87/15  
100/7 100/9  
emailing [1] 66/25  
emails [2] 16/2 16/9  
Embassy [2] 25/12 35/2  
embraced [1] 39/2  
emphasis [3] 132/18 147/18 157/9  
emphasize [3] 125/6 147/22 188/16  
emphasized [2] 132/15 134/22  
employ [1] 111/4  
employed [1] 14/21  
employee [1] 185/8  
employees [1] 99/24  
employment [1] 106/19  
enacted [1] 165/16  
encampment [1] 119/8  
encompasses [1] 15/1  
encountered [2] 125/25 148/5  
end [19] 17/8 32/16 59/25 102/2 103/18  
116/21 119/23 119/25 137/2 145/11 149/16  
153/14 161/12 162/25 165/13 168/19 176/7  
178/7 187/13  
endangering [1] 130/10  
ended [6] 145/8 166/2 170/12 171/10  
173/7 180/10  
ending [7] 56/24 58/17 71/17 139/12  
145/10 148/16 148/17  
Endowment [1] 108/3  
ends [1] 59/25  
endured [1] 125/10  
enemies [1] 148/7  
enemy [1] 171/14  
enforce [1] 122/5  
enforced [1] 118/18  
engaged [1] 160/4  
engendering [1] 28/20  
engineering [1] 15/3  
enhance [2] 122/8 135/6  
enlisted [11] 7/18 23/14 125/21 137/6  
144/13 167/3 175/2 175/2 177/12 177/19  
186/16  
enlistment [1] 117/3  
enormous [1] 147/17  
enrolled [1] 116/22  
enrollment [2] 117/8 175/24  
ensign [1] 16/22  
ensued [1] 119/12  
ensuring [1] 65/8  
entered [4] 50/19 50/22 52/2 70/7  
entering [2] 53/15 138/11  
entertainment [1] 118/17  
entire [7] 13/5 16/21 33/19 70/8 88/9  
143/9 157/21  
entirely [5] 7/10 7/17 7/18 51/12 52/5  
entirety [1] 114/2  
entities [2] 65/11 65/22  
entitled [4] 1/9 7/18 156/23 192/9  
environment [6] 32/4 32/20 159/20 160/2  
161/12 172/8  
episode [3] 41/4 42/9 130/18  
episodes [4] 127/2 128/18 129/23 130/4  
epithets [1] 173/25  
equal [8] 62/14 121/7 122/5 122/8 136/24  
138/10 145/3 177/8  
equipped [1] 7/14  
equity [2] 83/8 84/3  
equivalent [1] 177/1  
era [22] 115/10 123/2 127/3 127/6 132/10  
138/24 140/1 142/24 145/12 145/22 146/11  
148/1 178/17 178/23 179/11 179/14 179/18  
179/22 181/2 181/21 181/24 183/7  
eras [1] 112/18  
erupted [2] 130/16 179/4  
eruption [1] 158/19  
escalated [1] 129/11  
escape [1] 126/4  
especially [9] 48/23 70/9 78/6 95/1  
101/4 123/25 161/7 162/25 176/6  
ESQUIRE [13] 1/12 1/13 1/13 1/14 1/14  
1/15 1/15 1/17 1/17 1/18 1/18 1/19 1/19  
essays [1] 5/18  
essentially [7] 25/22 33/18 79/23 89/5  
156/16 171/10 185/12  
establish [1] 110/1  
established [1] 8/18  
establishes [1] 8/13  
establishing [1] 175/12  
estimate [1] 110/23

et [3] 1/6 34/9 126/3  
ethnic [9] 6/18 7/1 7/5 58/23 58/24  
71/13 147/11 147/11  
ethnicities [1] 122/20  
ethnicity [9] 8/19 9/5 9/13 9/18 68/21  
68/21 68/25 71/6 86/22  
Europe [1] 27/22  
evaluate [1] 133/23  
evaluated [2] 47/1 133/18  
evaluates [2] 9/6 9/15  
evaluation [1] 133/21  
even [16] 15/25 24/10 30/22 47/17 49/19  
50/8 51/12 53/14 61/24 98/25 126/8  
140/21 144/12 145/19 147/20 173/17  
even-numbered [1] 24/10  
evenly [1] 100/19  
event [10] 17/6 34/4 42/5 59/24 103/18  
103/19 127/4 127/15 149/13 187/12  
events [6] 109/14 126/15 127/17 146/13  
147/13 148/23  
eventually [5] 24/14 27/2 29/22 50/1  
136/6  
ever [4] 44/14 63/3 136/3 136/12  
every [9] 9/16 9/16 37/5 52/5 65/24  
81/23 95/20 159/16 189/25  
everybody [3] 75/16 98/8 171/3  
everyday [1] 116/15  
everyone [7] 3/2 13/21 27/2 35/21 40/20  
40/24 128/11  
Everyone's [1] 81/25  
everything [8] 33/4 43/8 52/9 53/16  
56/18 65/11 80/12 154/7  
evidence [15] 54/3 96/20 100/5 113/19  
114/20 139/12 146/19 146/21 157/16  
157/18 157/23 158/5 188/22 189/1 189/11  
exact [2] 37/4 58/6  
exactly [5] 39/14 51/14 146/25 168/2  
185/20  
examination [17] 3/16 19/6 40/10 40/13  
43/25 61/21 89/4 89/7 103/9 104/18 105/2  
128/12 141/7 141/8 150/6 177/22 177/23  
examine [2] 87/7 103/3  
example [20] 13/4 13/4 32/14 33/25 37/11  
69/14 69/16 96/3 117/5 117/6 117/22  
118/4 119/6 122/12 143/19 143/25 144/7  
160/22 186/23 190/18  
examples [6] 10/22 37/6 128/20 161/16  
164/23 184/19  
Excel [1] 67/14  
except [6] 10/1 10/5 11/6 11/10 12/23  
15/18  
excessive [1] 173/24  
exchange [2] 44/6 122/18  
exclusively [4] 72/22 73/2 75/18 78/7  
excuse [4] 28/11 29/24 43/3 51/25  
excused [2] 59/22 103/16  
executive [8] 25/15 25/20 25/21 25/22  
33/18 65/19 120/1 121/21  
exhibit [20] 53/25 54/2 58/16 66/23  
71/15 73/17 83/12 87/13 87/15 96/19  
100/4 102/2 102/12 113/18 114/2 157/16  
157/17 157/23 158/1 189/9  
Exhibit 148 [3] 83/12 87/13 102/12  
Exhibit 151 [2] 66/23 73/17  
Exhibit 164 [2] 100/4 102/2  
Exhibit 196 [1] 113/18  
Exhibit 197 [3] 157/16 157/17 157/23  
Exhibit 34 [1] 96/19  
Exhibit 479 [1] 71/15  
Exhibit 491 [2] 53/25 58/16  
exhibited [2] 36/24 188/25  
exhibits [8] 114/7 114/20 188/17 188/18  
188/24 189/18 189/19 189/22  
exist [1] 113/24  
existed [3] 124/9 144/16 160/1  
existential [1] 132/12  
existing [2] 123/21 154/19  
expected [2] 18/3 18/3  
experience [17] 9/5 9/14 13/13 27/25  
28/2 28/7 28/8 32/24 37/23 39/19 39/22  
39/25 48/8 105/24 116/15 151/6 154/1  
experienced [9] 119/2 126/22 159/1  
165/19 173/6 173/13 183/13 183/18 184/1  
experiences [5] 45/1 53/17 59/3 138/20  
186/21  
expert [13] 18/12 18/16 103/24 111/25  
112/5 112/10 115/22 124/20 146/12 149/22  
155/16 156/13 185/23  
expertise [6] 34/24 146/15 147/14 149/4  
149/5 156/22

experts [1] 17/24  
explain [25] 21/16 21/25 22/10 23/12  
23/12 23/12 23/12 23/12 23/12 23/12  
76/2 92/7 92/9 92/17 93/17 115/2 147/15  
152/13 160/6 161/25 164/10 176/2 176/11  
176/24  
explanatory [1] 74/1  
exploded [3] 115/10 123/2 123/25  
explore [1] 39/1  
explosion [4] 119/7 119/11 129/1 161/14  
Explosive [1] 96/5  
explosives [1] 119/10  
exposed [1] 35/21  
exposure [2] 19/22 47/2  
express [1] 6/13  
extend [2] 80/6 80/6  
extended [1] 133/4  
extensive [4] 55/11 112/18 113/3 125/2  
extent [7] 78/13 79/1 97/11 126/12 132/4  
132/6 157/19  
extenuating [1] 80/10  
external [2] 125/2 125/6  
extra [1] 98/25  
extracurricular [1] 43/17  
extraordinarily [1] 117/22  
extraordinary [1] 136/21  
extrapolate [1] 136/8  
extreme [1] 123/9  
extremely [1] 36/15  
eye [2] 29/10 30/10  
eyes [3] 116/8 139/22 161/5

**F**

faced [1] 130/19  
facets [2] 83/21 86/6  
facilities [5] 117/20 117/20 144/2  
162/10 162/20  
facing [2] 109/14 122/12  
fact [18] 7/17 12/18 18/16 18/17 54/13  
81/13 101/17 119/15 125/12 129/24 138/9  
178/21 181/6 182/14 190/5 190/11 190/16  
190/19  
factor [23] 4/20 5/2 5/10 47/24 47/25  
48/2 48/9 49/11 50/16 52/7 52/10 52/12  
54/21 55/2 56/1 56/2 56/7 70/25 71/1  
81/18 100/2 126/25 136/5  
factored [1] 78/9  
factors [15] 45/6 46/23 47/18 50/2 55/17  
56/2 56/8 56/10 58/22 58/23 59/6 125/3  
125/6 126/16 166/18  
facts [1] 166/14  
faculty [1] 105/15  
failed [1] 122/23  
failing [2] 60/25 132/24  
failures [1] 120/24  
fair [9] 1/3 1/21 72/17 86/1 103/11  
120/2 136/3 136/13 141/12  
fairly [5] 41/25 82/19 86/2 128/25 188/6  
fall [2] 15/4 69/11  
Falls [1] 187/2  
familiar [6] 4/9 4/11 7/25 52/18 58/6  
122/14  
family [1] 50/17  
far [4] 50/19 50/22 77/12 148/14  
fashion [1] 125/5  
faster [1] 18/3  
father [3] 19/21 41/19 41/22  
fathers [2] 125/10 166/3  
favor [3] 10/2 10/6 10/8  
feared [2] 130/9 140/24  
February [1] 8/9  
Federal [1] 192/16  
feel [7] 39/2 66/8 66/9 66/13 66/15  
73/12 191/16  
feeling [1] 132/11  
fell [1] 69/25  
fellow [3] 127/10 127/12 129/4  
Fellowship [2] 108/5 108/7  
fellowships [4] 107/20 107/23 107/24  
108/1  
felt [4] 30/16 30/21 37/22 191/15  
ferret [1] 113/23  
few [6] 3/3 15/18 58/2 58/8 99/21 142/7  
fewer [1] 171/16  
field [8] 111/3 112/6 112/19 151/18  
151/22 153/9 153/9 153/10  
fields [1] 108/6  
fifth [1] 97/3  
fight [2] 118/19 129/13  
fighter [1] 152/5

F	F	F
fighting [1] 24/1 12/10 11/20 91/1 128/23	fighting [1] 24/1 12/10 11/20 91/1 128/23	fighting [1] 24/1 12/10 11/20 91/1 128/23
fights [1] 163/19	fights [1] 163/19	fights [1] 163/19
figure [6] 16/20 19/21 41/19 41/22 123/14 125/16	figure [6] 16/20 19/21 41/19 41/22 123/14 125/16	figure [6] 16/20 19/21 41/19 41/22 123/14 125/16
file [1] 190/23	file [1] 190/23	file [1] 190/23
filed [1] 157/22	filed [1] 157/22	filed [1] 157/22
files [1] 156/5	files [1] 156/5	files [1] 156/5
fill [2] 105/16 122/4	fill [2] 105/16 122/4	fill [2] 105/16 122/4
film [2] 135/24 136/1	film [2] 135/24 136/1	film [2] 135/24 136/1
final [2] 80/14 89/20	final [2] 80/14 89/20	final [2] 80/14 89/20
finale [1] 169/24	finale [1] 169/24	finale [1] 169/24
finalized [1] 80/13	finalized [1] 80/13	finalized [1] 80/13
finally [2] 24/15 91/2	finally [2] 24/15 91/2	finally [2] 24/15 91/2
find [6] 11/19 60/23 67/8 138/11 168/10 173/22	find [6] 11/19 60/23 67/8 138/11 168/10 173/22	find [6] 11/19 60/23 67/8 138/11 168/10 173/22
findings [4] 190/5 190/11 190/16 190/19	findings [4] 190/5 190/11 190/16 190/19	findings [4] 190/5 190/11 190/16 190/19
fine [18] 17/16 18/6 55/22 55/24 56/5 58/12 60/7 60/8 60/20 63/7 104/11 114/12 141/19 188/13 190/8 190/15 190/15 191/2	fine [18] 17/16 18/6 55/22 55/24 56/5 58/12 60/7 60/8 60/20 63/7 104/11 114/12 141/19 188/13 190/8 190/15 190/15 191/2	fine [18] 17/16 18/6 55/22 55/24 56/5 58/12 60/7 60/8 60/20 63/7 104/11 114/12 141/19 188/13 190/8 190/15 190/15 191/2
finish [1] 76/21	finish [1] 76/21	finish [1] 76/21
finished [1] 187/20	finished [1] 187/20	finished [1] 187/20
finishing [3] 26/16 37/8 188/2	finishing [3] 26/16 37/8 188/2	finishing [3] 26/16 37/8 188/2
fire [8] 111/20 113/3 124/7 132/20 142/23 169/9 169/10 169/16	fire [8] 111/20 113/3 124/7 132/20 142/23 169/9 169/10 169/16	fire [8] 111/20 113/3 124/7 132/20 142/23 169/9 169/10 169/16
fired [1] 171/5	fired [1] 171/5	fired [1] 171/5
first [57] 3/10 16/3 18/25 19/23 22/18 24/3 32/18 32/19 32/19 48/24 51/18 57/11 57/11 57/13 57/15 61/15 64/15 64/17 66/24 68/4 70/9 70/10 70/22 74/1 77/17 77/20 78/8 79/12 79/13 79/25 82/20 83/5 84/25 87/14 89/14 97/3 98/14 104/24 114/17 115/2 115/4 115/25 117/16 126/2 129/10 150/2 150/3 158/11 158/13 159/12 161/13 164/4 165/6 167/3 169/12 172/20 172/25 173/3	first [57] 3/10 16/3 18/25 19/23 22/18 24/3 32/18 32/19 32/19 48/24 51/18 57/11 57/11 57/13 57/15 61/15 64/15 64/17 66/24 68/4 70/9 70/10 70/22 74/1 77/17 77/20 78/8 79/12 79/13 79/25 82/20 83/5 84/25 87/14 89/14 97/3 98/14 104/24 114/17 115/2 115/4 115/25 117/16 126/2 129/10 150/2 150/3 158/11 158/13 159/12 161/13 164/4 165/6 167/3 169/12 172/20 172/25 173/3	first [57] 3/10 16/3 18/25 19/23 22/18 24/3 32/18 32/19 32/19 48/24 51/18 57/11 57/11 57/13 57/15 61/15 64/15 64/17 66/24 68/4 70/9 70/10 70/22 74/1 77/17 77/20 78/8 79/12 79/13 79/25 82/20 83/5 84/25 87/14 89/14 97/3 98/14 104/24 114/17 115/2 115/4 115/25 117/16 126/2 129/10 150/2 150/3 158/11 158/13 159/12 161/13 164/4 165/6 167/3 169/12 172/20 172/25 173/3
fit [2] 95/12 96/2	fit [2] 95/12 96/2	fit [2] 95/12 96/2
fitness [1] 22/13	fitness [1] 22/13	fitness [1] 22/13
five [10] 25/2 64/25 65/16 74/1 89/19 89/20 109/20 130/7 170/5 174/15	five [10] 25/2 64/25 65/16 74/1 89/19 89/20 109/20 130/7 170/5 174/15	five [10] 25/2 64/25 65/16 74/1 89/19 89/20 109/20 130/7 170/5 174/15
five hours [1] 130/7	five hours [1] 130/7	five hours [1] 130/7
five years [3] 89/19 89/20 109/20	five years [3] 89/19 89/20 109/20	five years [3] 89/19 89/20 109/20
flag [7] 26/3 26/5 26/6 33/14 125/22 126/6 186/11	flag [7] 26/3 26/5 26/6 33/14 125/22 126/6 186/11	flag [7] 26/3 26/5 26/6 33/14 125/22 126/6 186/11
flagship [1] 176/13	flagship [1] 176/13	flagship [1] 176/13
flat [1] 37/13	flat [1] 37/13	flat [1] 37/13
fleet [9] 16/23 26/8 70/15 98/2 153/23 165/12 166/9 177/18 180/8	fleet [9] 16/23 26/8 70/15 98/2 153/23 165/12 166/9 177/18 180/8	fleet [9] 16/23 26/8 70/15 98/2 153/23 165/12 166/9 177/18 180/8
fleets [1] 150/25	fleets [1] 1	

[illegible]

**I**  
**I'm...** [9] 189/4 189/7 189/8 189/5  
 189/15 189/20 190/17 191/10 191/13  
**I've** [25] 8/16 8/18 13/3 27/21 37/5 49/3  
 50/15 50/24 51/1 52/9 53/16 86/10 100/15  
 110/23 111/21 119/6 148/1 153/21 153/21  
 154/3 154/6 154/7 154/19 154/20 184/3  
**Idaho** [1] 187/2  
**idea** [3] 52/1 92/25 175/20  
**identifies** [1] 183/4  
**identify** [3] 35/10 57/17 84/9  
**identifying** [2] 35/11 188/22  
**identity** [1] 125/8  
**II** [27] 116/4 116/10 116/24 117/7 117/25  
 118/9 118/22 143/23 153/14 154/9 158/15  
 159/14 159/15 159/22 159/25 160/13  
 160/15 160/20 161/9 161/11 162/8 171/11  
 178/8 178/14 178/16 178/17 185/13  
**III** [1] 174/24  
**illiterate** [1] 165/25  
**illustrate** [1] 13/4  
**image** [2] 77/5 99/23  
**immediately** [3] 11/21 99/18 116/19  
**impact** [16] 4/7 9/5 9/13 31/14 32/24  
 38/24 49/8 71/2 77/16 116/7 119/5 119/14  
 122/8 130/3 169/23 177/19  
**implement** [2] 121/18 133/25  
**implementation** [1] 139/7  
**implemented** [1] 139/5  
**implementing** [1] 174/19  
**implications** [1] 157/20  
**import** [1] 186/1  
**importance** [4] 36/12 38/21 132/15 147/22  
**important** [20] 34/14 36/15 39/20 39/23  
 40/1 40/3 40/5 75/2 82/1 95/24 96/1 96/8  
 96/11 96/14 96/14 98/23 126/18 148/13  
 162/10 171/23  
**importantly** [2] 70/14 97/25  
**imposed** [1] 117/2  
**imprisoned** [1] 161/22  
**inappropriate** [1] 30/13  
**Inchon** [2] 165/11 167/9  
**incidences** [1] 147/4  
**incident** [23] 29/5 29/14 29/18 29/20  
 30/14 30/18 30/24 31/1 31/3 31/14 32/5  
 38/16 38/20 39/3 39/8 39/15 51/6 161/4  
 161/13 163/14 163/16 166/12 171/7  
**incidents** [16] 51/14 126/17 159/2 160/23  
 161/13 162/9 166/9 166/11 167/7 167/13  
 172/1 172/16 177/13 183/13 183/18 184/1  
**include** [9] 15/2 34/6 34/7 35/17 46/23  
 49/11 72/5 114/14 158/8  
**included** [2] 44/21 80/14  
**includes** [4] 45/5 76/24 109/13 109/14  
**including** [6] 84/20 109/14 110/11 130/5  
 154/8 169/14  
**incorporating** [2] 47/3 47/18  
**incorrect** [2] 54/23 87/6  
**increase** [25] 97/6 101/18 135/7 137/16  
 138/3 138/21 139/3 140/22 145/20 145/25  
 174/2 174/7 174/10 174/11 174/12 174/19  
 174/21 175/11 175/24 176/20 182/2 183/8  
 183/12 183/16 183/25  
**increased** [4] 139/23 159/1 182/18 182/21  
**Increases** [1] 97/10  
**increasing** [6] 135/17 138/7 140/17  
 140/21 174/25 176/12  
**incredibly** [1] 132/4  
**indeed** [1] 44/3  
**INDEX** [1] 2/1  
**indicate** [3] 45/3 62/12 75/15  
**indicated** [3] 29/25 55/14 68/23  
**indicators** [2] 44/19 49/12  
**individual** [9] 9/16 11/20 28/13 28/14  
 32/2 38/23 44/19 120/21 173/13  
**individual's** [1] 11/13  
**individually** [1] 72/2  
**individuals** [17] 16/21 29/16 31/8 31/18  
 47/5 53/18 65/24 66/1 75/15 76/8 78/22  
 80/5 81/24 81/25 84/20 91/3 94/4  
**Indonesia** [1] 107/4  
**ineffective** [4] 166/25 172/5 180/15  
 181/22  
**inescapably** [2] 140/10 140/13  
**infill** [1] 152/1  
**influence** [2] 9/6 9/14  
**influencer** [1] 81/21  
**influences** [1] 47/21  
**influx** [4] 164/24 165/14 167/18 180/7  
**information** [6] 16/12 29/10 29/11 114/1

132/1 134/25  
**informs** [2] 33/10 49/11  
**infused** [1] 11/15/12  
**initial** [1] 81/16  
**initially** [6] 20/17 20/19 24/13 45/15  
 48/23 101/9  
**Initiative** [1] 8/14  
**injunction** [1] 157/4  
**injured** [2] 165/7 168/1  
**injuries** [1] 127/14  
**inmates** [2] 129/4 129/6  
**innate** [1] 96/10  
**inside** [1] 144/17  
**insights** [1] 6/16  
**insignia** [2] 23/10 23/12  
**installation** [1] 162/14  
**installations** [3] 118/12 125/23 129/17  
**instance** [2] 29/2 69/21  
**instances** [18] 11/20 28/24 32/11 33/22  
 125/22 125/23 140/3 160/19 162/7 163/2  
 164/20 166/5 167/15 172/10 172/13 177/3  
 177/6 177/16  
**instead** [2] 30/9 30/11  
**instigation** [1] 121/20  
**instill** [1] 96/9  
**institute** [4] 14/19 113/4 134/7 134/16  
**institution** [2] 97/1 126/10  
**institutional** [3] 84/15 162/6 173/13  
**institutions** [8] 76/25 107/14 107/19  
 107/25 108/9 108/25 110/8 124/6  
**integrated** [2] 12/15 15/13  
**integration** [3] 121/7 154/20 157/10  
**intelligence** [1] 34/8  
**Intelligent** [1] 121/13  
**intend** [1] 157/12  
**intended** [1] 122/18  
**intensity** [1] 104/13  
**intensive** [2] 75/8 175/19  
**intentions** [1] 180/20  
**interact** [3] 36/10 36/11 77/10  
**interactions** [4] 32/25 33/6 36/13 36/15  
**intercollegiate** [1] 92/13  
**intercom** [1] 168/8  
**interest** [5] 33/3 45/15 62/17 92/21  
 133/22  
**interested** [5] 19/18 121/15 121/16  
 134/20 186/13  
**interesting** [2] 16/20 142/6  
**interject** [1] 77/8  
**internal** [4] 125/13 125/17 125/18 190/13  
**international** [7] 26/13 34/2 35/16 48/15  
 108/1 108/4 108/23  
**Internet** [1] 16/8  
**interpret** [1] 8/8  
**interpretations** [1] 152/16  
**interrupt** [1] 73/13  
**Interval** [1] 87/21  
**intervals** [2] 18/10 88/11  
**intervene** [1] 168/6  
**interview** [1] 169/8  
**interviewed** [4] 133/7 164/7 168/7 169/7  
**interviewing** [1] 154/23  
**interviews** [1] 47/3  
**Intrepid** [3] 165/11 166/8 167/9  
**introduce** [2] 60/9 63/16  
**invade** [1] 162/19  
**invented** [1] 16/3  
**investigate** [1] 131/11  
**investigated** [1] 31/19  
**investigation** [7] 31/1 31/2 31/3 31/5  
 31/7 127/15 166/13  
**investigations** [4] 166/11 166/17 167/5  
 167/11  
**investigator** [1] 31/4  
**invited** [2] 109/7 109/23  
**involved** [7] 29/16 31/3 114/22 135/4  
 160/10 171/5 191/12  
**Iraq** [2] 28/6 90/14  
**irrelevant** [6] 6/19 6/22 7/2 7/6 7/10  
 7/14  
**is** [382]  
**Island** [6] 161/19 162/15 165/10 166/8  
 167/8 175/22  
**isn't** [4] 47/15 75/18 75/19 82/17  
**isolated** [1] 70/12  
**isolation** [1] 13/5  
**issue** [6] 42/21 43/10 44/25 80/7 90/19  
 132/7  
**issued** [4] 8/4 8/9 120/1 180/18  
**issues** [10] 42/17 42/24 86/6 86/8 125/25

146/12 155/17 155/19 173/20 189/15  
**it** [222]  
**it's** [2] 11/14 102/21 17 23/13 31/12  
 31/13 36/15 37/4 40/19 40/23 44/1 45/14  
 45/14 45/15 46/23 47/17 47/23 48/9 50/7  
 50/9 52/12 54/3 54/5 57/20 60/7 60/22  
 60/23 63/7 64/11 67/12 67/12 67/21 68/23  
 69/15 69/16 71/1 71/17 73/18 73/18 77/11  
 78/11 78/19 78/20 80/1 80/14 81/19 81/21  
 82/1 82/19 85/15 86/2 86/11 88/17 89/1  
 91/7 91/10 91/22 92/16 92/23 96/14 97/21  
 98/23 101/17 101/25 103/14 105/21 109/15  
 112/8 113/9 113/22 118/13 125/25 127/19  
 127/23 128/2 132/3 132/3 133/11 137/23  
 143/8 149/13 150/16 171/12 171/17 176/14  
 177/9 177/10 178/1 184/19 186/20 188/23  
**item** [1] 133/22  
**items** [2] 67/2 188/22  
**its** [25] 6/19 7/15 29/22 42/19 43/1 43/5  
 114/2 117/16 123/10 129/13 130/17 132/20  
 134/4 135/13 136/23 142/24 148/7 160/18  
 163/17 163/18 165/2 165/17 174/17 182/18  
 182/25  
**itself** [1] 87/9

## J

**J-A-S-O-N** [1] 19/2  
**J-O-H-N** [1] 150/3  
**J.** [1] 156/4  
**J. Schneller** [1] 156/4  
**JAG** [1] 166/13  
**Jail** [2] 129/2 129/22  
**James** [2] 7/24 174/24  
**January** [1] 171/9  
**Japanese** [1] 162/19  
**Jason** [4] 2/6 17/23 19/2 19/11  
**Jim** [1] 118/13  
**job** [17] 43/15 64/15 64/17 65/4 65/21  
 71/24 99/24 150/21 162/4 162/5 166/20  
 172/4 177/8 177/10 179/23 181/6 181/10  
**jobs** [7] 64/19 159/20 161/8 166/3 167/19  
 170/23 177/10  
**JOHN** [8] 1/18 2/13 17/25 39/18 149/20  
 150/3 150/10 173/5  
**Johns** [5] 26/13 26/15 48/11 48/14 48/18  
**Johnson** [1] 174/14  
**join** [6] 23/3 47/9 48/24 109/6 109/7  
 164/13  
**joint** [1] 27/7  
**JOSHUA** [1] 1/17  
**journal** [2] 111/2 111/3  
**journey** [4] 9/7 9/15 70/8 97/14  
**Judicial** [1] 192/10  
**July** [3] 127/8 131/21 163/7  
**July '70** [1] 131/21  
**July 1969** [1] 163/7  
**jump** [1] 74/10  
**June** [1] 79/20  
**June 30th** [1] 79/20  
**junior** [5] 42/3 64/18 95/15 96/8 138/7  
**juniors** [1] 79/7  
**jury** [1] 189/18  
**just** [81] 3/18 8/3 11/25 14/13 16/8  
 16/13 18/9 19/14 19/16 19/20 20/3 20/7  
 33/11 34/21 37/16 40/23 41/4 44/5 44/9  
 44/25 47/19 53/5 53/22 54/8 55/7 55/8  
 57/10 58/8 58/21 62/18 62/23 63/5 63/16  
 63/20 68/18 71/23 72/5 75/12 75/21 77/21  
 78/19 80/15 81/14 82/21 85/1 85/21 87/8  
 89/5 89/11 94/24 95/23 96/17 98/6 98/7  
 98/25 101/18 116/17 123/23 128/18 129/22  
 131/2 133/11 142/7 146/12 148/25 162/8  
 167/6 167/23 168/22 172/2 173/20 181/1  
 184/21 185/6 185/22 186/11 186/20 187/3  
 187/22 188/20 191/15  
**justice** [5] 31/12 131/24 135/25 139/3  
 180/9

## K

**Kacher** [3] 57/19 57/20 57/21  
**Kansas** [7] 105/8 105/11 105/14 106/25  
 107/9 108/16 118/14  
**Kaohsiung** [2] 165/12 167/9  
**keep** [4] 13/2 65/10 127/20 153/8  
**Kelley** [3] 163/22 164/2 164/7  
**key** [6] 143/5 162/12 162/14 162/15  
 162/18 174/25  
**kicked** [1] 127/13  
**kids** [1] 161/8  
**kill** [1] 168/20





<b>M</b>	<b>modernized</b> [1] 121/12
<b>Marine...</b> [5] 176/8 176/410 176/117/1	<b>moment</b> [1] 17/19
184/1	<b>money</b> [1] 176/8
<b>Marines</b> [8] 127/10 127/12 143/6 161/2	<b>mono</b> [1] 126/16
161/10 169/1 169/9 169/14	<b>mono-causal</b> [1] 126/16
<b>maritime</b> [1] 155/14	<b>Monterey</b> [1] 187/3
<b>mark</b> [5] 77/14 77/19 77/22 79/3 79/8	<b>month</b> [1] 137/5
<b>marker</b> [1] 36/20	<b>months</b> [2] 80/6 123/25
<b>marking</b> [1] 8/3	<b>morale</b> [2] 31/17 33/20
<b>Marland</b> [1] 168/7	<b>more</b> [40] 6/23 7/5 12/16 35/9 39/14
<b>Marland Townsend</b> [1] 168/7	47/13 59/15 68/24 69/17 72/18 74/21
<b>Marshall</b> [1] 111/14	74/23 79/18 82/17 82/19 83/9 85/15 85/22
<b>martialed</b> [1] 119/17	87/11 89/2 93/16 95/3 95/13 95/13 130/14
<b>martials</b> [1] 166/22	134/13 142/7 147/10 148/9 151/6 158/24
<b>Martin</b> [4] 124/1 168/18 179/6 179/13	165/18 166/24 171/16 175/25 177/13
<b>MARYLAND</b> [3] 1/1 1/6 192/6	179/16 182/25 183/23 189/15
<b>mass</b> [1] 61/8	<b>Morison</b> [1] 111/13
<b>massive</b> [2] 127/13 148/5	<b>morning</b> [13] 3/2 3/7 3/14 3/15 3/18 18/7
<b>mast</b> [3] 31/9 31/11 180/12	18/19 18/21 19/8 19/9 40/15 40/16 80/23
<b>master's</b> [4] 26/12 48/15 152/2 152/3	<b>MORTARA</b> [20] 1/12 2/7 2/9 2/10 17/9
<b>masts</b> [2] 167/21 180/10	40/10 40/14 44/8 55/18 59/12 59/16 61/20
<b>material</b> [1] 139/10	61/22 62/11 77/9 78/25 89/3 103/7 103/10
<b>materials</b> [2] 122/18 156/9	103/15
<b>math</b> [4] 82/13 82/16 83/1 85/18	<b>most</b> [37] 16/13 38/7 38/10 39/7 65/8
<b>matter</b> [3] 1/9 7/19 192/9	70/10 70/14 75/17 78/21 83/2 91/5 91/12
<b>matters</b> [2] 118/13 147/16	92/4 93/10 96/4 97/25 98/1 111/19 116/25
<b>Max</b> [1] 84/17	117/6 118/4 119/12 125/19 126/19 126/22
<b>may</b> [35] 3/13 4/12 9/6 9/14 12/18 17/5	129/25 131/1 153/24 159/19 159/20 162/10
18/12 19/4 23/25 23/25 40/11 44/4 59/12	166/19 166/25 167/13 171/11 171/22 172/6
59/12 59/19 60/2 60/4 61/14 61/19 61/20	<b>mostly</b> [4] 42/6 74/14 90/13 160/1
62/15 73/11 74/25 76/19 80/6 80/6 81/7	<b>motion</b> [1] 157/3
81/8 81/9 93/25 114/2 114/25 128/12	<b>motivation</b> [1] 5/9
131/21 186/17	<b>motor</b> [3] 14/23 14/25 15/2
<b>May 1931</b> [1] 131/21	<b>Motors</b> [2] 185/23 185/25
<b>May 26</b> [1] 23/25	<b>move</b> [8] 39/1 104/7 111/24 122/25 137/3
<b>may-recall</b> [1] 44/4	156/13 169/19 169/21
<b>maybe</b> [6] 69/15 79/22 80/7 80/8 104/15	<b>moved</b> [9] 27/5 31/24 106/25 107/5 107/6
145/22	107/8 136/6 139/8 139/9
<b>MC</b> [1] 168/8	<b>movement</b> [1] 26/7
<b>MCCARTHY</b> [1] 1/15	<b>moves</b> [2] 114/9 158/4
<b>McGuire</b> [1] 84/14	<b>moving</b> [6] 18/3 24/13 28/13 99/19 107/16
<b>McNamara</b> [2] 165/16 185/25	162/15
<b>me</b> [44] 11/13 18/23 24/25 27/9 28/11	<b>Mr</b> [17] 2/5 2/7 2/7 2/9 2/9 2/10 2/13
29/6 29/19 29/22 29/24 30/15 30/21 33/2	2/14 3/17 19/7 40/14 61/22 66/19 89/8
33/13 37/9 37/14 38/1 38/3 43/3 46/11	103/10 150/7 177/24
48/18 51/25 53/18 53/19 58/25 62/20	<b>Mr.</b> [48] 3/13 3/18 3/19 12/1 17/1 17/2
63/22 66/18 68/9 73/13 76/11 76/14 77/22	17/9 17/15 17/17 18/7 19/4 29/25 40/9
84/9 84/22 88/18 127/20 142/6 147/15	40/10 44/8 55/18 59/12 59/16 59/17 60/14
147/15 168/20 168/20 179/21 187/22 190/5	61/20 61/23 62/11 63/9 68/8 77/9 78/25
<b>mean</b> [17] 10/7 28/10 31/21 32/2 74/23	79/20 89/3 89/4 103/6 103/7 103/15
76/18 92/1 97/21 122/7 125/24 126/15	149/19 149/23 156/20 177/21 177/22 179/9
160/9 166/22 169/18 186/6 188/1 190/12	185/3 185/4 187/6 187/8 187/16 187/17
<b>meaning</b> [1] 64/3	188/3 188/9 189/23
<b>meaningful</b> [1] 37/23	<b>Mr. Carmichael</b> [3] 3/13 12/1 17/1
<b>means</b> [11] 8/3 16/12 20/10 24/8 31/23	<b>Mr. Connolly</b> [6] 17/2 156/20 177/22
64/6 65/20 160/7 169/19 185/22 186/6	179/9 185/3 187/8
<b>meant</b> [5] 73/9 122/7 134/16 165/4 186/12	<b>Mr. Gardner</b> [3] 187/17 188/9 189/23
<b>measure</b> [1] 91/3	<b>Mr. Mendez</b> [13] 17/15 17/17 18/7 19/4
<b>measures</b> [5] 121/19 121/22 121/22 122/6	29/25 40/9 59/17 89/4 103/6 149/19
174/19	177/21 185/4 187/6
<b>medals</b> [1] 23/19	<b>Mr. Mortara</b> [13] 17/9 40/10 44/8 55/18
<b>MEDHA</b> [1] 1/19	59/12 59/16 61/20 62/11 77/9 78/25 89/3
<b>media</b> [2] 16/6 171/2	103/7 103/15
<b>medical</b> [3] 73/23 80/7 90/19	<b>Mr. Sherwood</b> [1] 149/23
<b>Mediterranean</b> [2] 15/7 90/5	<b>Mr. Steve Vahsen</b> [1] 60/14
<b>meet</b> [4] 7/15 40/19 60/12 90/24	<b>Mr. Strawbridge</b> [3] 68/8 187/16 188/3
<b>meeting</b> [2] 34/2 40/25	<b>Mr. Vahsen</b> [3] 61/23 63/9 79/20
<b>meetings</b> [1] 110/1	<b>Mr. Wood</b> [2] 3/18 3/19
<b>member</b> [8] 23/1 24/12 35/13 96/25 104/8	<b>Ms</b> [4] 2/11 2/12 105/3 141/9
109/20 124/2 124/4	<b>Ms.</b> [22] 12/3 55/10 57/25 59/5 104/3
<b>members</b> [39] 35/9 35/15 43/19 57/3 61/24	104/8 104/17 104/18 112/2 113/16 128/12
105/15 110/2 116/7 116/11 116/16 116/21	141/5 141/6 149/8 149/9 156/19 187/24
117/10 118/16 118/23 119/2 119/19 120/25	187/24 188/21 189/25 190/23 191/1
122/14 122/19 122/20 124/21 125/21 126/8	<b>Ms. Gargeya</b> [6] 104/3 104/18 113/16
127/9 130/5 130/10 130/12 130/14 130/19	128/12 141/5 149/9
130/22 134/7 134/12 134/18 135/23 139/21	<b>Ms. Herndon</b> [3] 12/3 188/21 189/25
140/5 140/6 144/13 147/18	<b>Ms. Hudson</b> [3] 187/24 190/23 191/1
<b>men</b> [7] 11/6 11/10 12/20 12/23 13/2	<b>Ms. Manogue</b> [1] 187/24
38/13 117/21	<b>Ms. Munnelly</b> [1] 59/5
<b>men's</b> [1] 94/17	<b>Ms. Munnelly's</b> [1] 57/25
<b>mend</b> [1] 130/25	<b>Ms. Thomas</b> [1] 55/10
<b>MENDEZ</b> [20] 1/19 2/7 2/9 2/13 17/15	<b>Ms. Wyrick</b> [6] 104/8 104/17 112/2 141/6
17/17 18/7 19/4 19/7 29/25 40/9 59/17	149/8 156/19
89/4 89/8 103/6 149/19 150/7 177/21	<b>much</b> [37] 17/4 17/8 18/3 19/15 53/4
185/4 187/6	61/11 61/18 75/8 75/9 77/11 90/4 101/6
<b>menial</b> [6] 159/20 160/4 162/4 166/4	103/16 103/21 103/22 104/19 114/22
167/19 170/22	116/19 118/23 120/4 120/20 121/6 134/21
<b>menial-type</b> [1] 159/20	149/11 149/17 170/10 174/8 177/8 178/2
<b>mental</b> [1] 173/12	178/15 187/5 187/10 187/14 188/14 191/9
<b>mentees</b> [2] 36/10 36/14	191/14 191/20
<b>mentioned</b> [22] 13/15 16/8 25/20 41/19	
45/19 50/14 95/23 107/14 109/3 131/2	
133/10 133/14 147/10 147/11 147/11	
162/9 164/8 166/7 167/6 168/24 176/22	
<b>mentor</b> [4] 27/13 36/1 36/8 41/24	
<b>mentoring</b> [1] 8/20	
<b>mentors</b> [1] 19/20	
<b>merit</b> [27] 21/14 21/20 21/23 22/5 22/6	
22/8 22/14 45/19 46/1 46/5 46/9 46/16	
47/7 47/8 47/9 47/17 47/20 47/25 48/2	
63/21 63/23 81/14 81/21 82/1 82/2 82/6	
192/4	
<b>mess</b> [4] 160/3 160/8 170/23 177/10	
<b>message</b> [1] 180/18	
<b>messman</b> [1] 160/8	
<b>messmen</b> [2] 160/3 160/7	
<b>met</b> [6] 10/10 34/11 40/17 130/8 141/14	
177/25	
<b>meth</b> [1] 163/4	
<b>methodology</b> [16] 83/21 86/6 106/17	
107/18 111/5 112/13 112/15 113/7 113/9	
113/10 154/24 155/23 155/25 156/6 175/15	
175/16	
<b>MEU</b> [2] 15/16 15/17	
<b>Mexico</b> [1] 107/5	
<b>MICHAEL</b> [1] 1/13	
<b>MICHEAL</b> [1] 1/23	
<b>microphone</b> [2] 19/14 104/23	
<b>mid</b> [15] 144/12 145/1 146/17 146/18	
146/20 147/1 147/6 148/24 158/25 174/5	
174/16 177/4 177/7 177/16 183/5	
<b>mid-'60s</b> [1] 174/16	
<b>mid-'70s</b> [3] 147/6 158/25 174/5	
<b>mid-1960s</b> [1] 145/1	
<b>mid-1970s</b> [9] 146/17 146/18 146/20 147/1	
148/24 177/4 177/7 177/16 183/5	
<b>mid-20th</b> [1] 144/12	
<b>middle</b> [7] 27/21 37/12 42/6 75/22 90/5	
100/9 148/20	
<b>Middle East</b> [1] 90/5	
<b>MidEquityStudy.pdf</b> [1] 83/17	
<b>midshipman</b> [10] 21/18 22/12 38/14 39/3	
39/12 46/25 48/8 75/3 91/5 98/24	
<b>midshipmen</b> [58] 15/18 19/22 27/15 36/1	
36/4 45/4 45/12 70/11 70/23 72/8 72/11	
76/5 76/22 77/13 82/16 82/22 82/23 83/8	
83/9 83/16 84/3 84/4 84/6 84/19 85/22	
85/22 88/1 88/6 88/9 88/11 88/19 88/22	
90/17 91/8 91/13 91/14 91/16 91/25 92/5	
92/11 92/11 92/20 94/12 94/20 95/3 95/9	
95/14 98/1 98/21 99/24 99/25 101/20	
138/21 173/5 173/8 173/10 174/15 174/18	
<b>Midway</b> [3] 165/10 166/8 167/8	
<b>night</b> [24] 30/22 59/3 78/15 79/16 79/17	
80/22 90/17 91/6 92/25 101/18 104/12	
119/21 127/22 136/8 138/18 138/22 140/24	
141/1 148/4 169/15 169/15 176/20 185/24	
188/17	
<b>mile</b> [1] 42/7	
<b>miles</b> [1] 170/25	
<b>militarily</b> [1] 47/17	
<b>military</b> [217]	
<b>military's</b> [5] 115/14 134/19 138/24	
139/16 139/24	
<b>military-needed</b> [1] 117/3	
<b>million</b> [1] 130/21	
<b>mind</b> [7] 3/10 18/22 61/25 63/22 78/25	
104/23 150/1	
<b>mine</b> [1] 164/6	
<b>Minimum</b> [1] 69/3	
<b>minor</b> [1] 122/22	
<b>minorities</b> [2] 69/22 69/22	
<b>minority</b> [11] 8/19 68/23 74/17 166/25	
172/5 180/16 180/19 180/24 181/22 182/6	
182/21	
<b>minute</b> [3] 80/23 81/1 161/24	
<b>minutes</b> [3] 3/3 127/24 128/5	
<b>Mischaracterizes</b> [1] 59/8	
<b>miss</b> [2] 75/9 95/6	
<b>missed</b> [1] 58/12	
<b>missile</b> [1] 171/15	
<b>mission</b> [7] 28/8 28/10 28/12 28/16 28/16	
39/23 123/10	
<b>missions</b> [3] 32/9 35/18 49/9	
<b>mixed</b> [1] 12/18	
<b>mixed-gender</b> [1] 12/18	
<b>mob</b> [1] 118/6	
<b>models</b> [2] 177/17 177/18	
<b>modern</b> [10] 9/23 10/1 10/5 11/5 11/9	
153/12 153/15 153/17 154/21 185/13	

M	muggings [1]	163/8
Mullen [1]	186/24	
multiple [6]	83/5 108/6 126/16 130/4 135/19 145/1	
multiservice [1]	113/5	
multitude [1]	50/1	
munitions [5]	161/25 162/1 162/1 162/16 169/15	
Munnelly [2]	56/16 59/5	
Munnelly's [1]	57/25	
museums [1]	109/14	
mutiny [1]	161/14	
my [128]	3/2 3/4 3/24 11/25 15/17 17/22 18/1 19/20 22/6 22/24 24/15 24/21 26/12 26/23 27/2 27/9 28/3 29/15 29/19 30/15 30/15 30/20 32/25 33/2 33/3 34/4 35/19 35/20 36/17 36/18 36/19 37/10 37/12 37/13 37/22 38/1 38/10 38/13 38/18 41/2 41/25 42/8 42/10 42/20 44/24 45/24 48/8 48/18 50/15 50/15 50/17 50/17 51/3 52/9 52/10 52/10 52/11 52/16 53/12 53/16 53/17 53/17 53/17 53/18 55/9 57/10 57/10 57/11 57/17 60/25 63/24 65/14 68/8 69/9 71/24 73/8 79/7 89/18 92/7 93/14 105/12 105/20 106/21 107/8 107/25 109/18 109/20 111/19 111/23 112/16 115/4 123/5 124/12 139/7 140/16 140/19 142/4 142/22 146/10 147/14 147/24 147/24 148/22 149/5 152/3 154/5 154/21 155/13 156/2 156/4 156/5 158/13 158/18 158/23 168/21 168/22 168/22 180/12 183/23 184/18 186/2 187/6 188/21 189/3 189/4 189/13 189/14 191/10	
myself [7]	34/7 40/20 60/9 67/2 67/4 100/7 155/5	
N		
nail [1]	49/17	
name [19]	3/10 19/1 19/10 60/24 61/4 61/8 61/15 61/16 77/5 99/23 104/9 104/24 150/2 150/3 150/3 150/9 163/21 172/23 172/24	
named [1]	168/14	
nappy [1]	30/10	
NAPS [8]	5/24 20/25 21/1 23/5 41/23 49/23 94/4 94/6	
narrowly [1]	129/20	
narrowly-averted [1]	129/20	
NASO [1]	155/13	
nasty [2]	29/12 30/13	
nation [5]	96/15 117/18 118/24 119/1 119/3	
national [8]	27/3 108/1 108/3 123/11 127/4 158/16 158/21 172/17	
nationals [2]	35/17 130/20	
native [5]	38/14 67/15 69/15 73/18 168/15	
natural [1]	33/7	
NAV [1]	180/18	
naval [188]	1/6 1/21 4/10 5/22 14/6 16/21 19/13 19/18 19/24 20/2 20/13 20/18 20/19 20/21 21/1 21/3 21/5 21/7 21/9 21/21 22/5 22/15 22/19 22/20 23/4 24/18 26/3 26/16 27/10 27/11 33/15 33/16 35/24 36/1 38/3 38/11 39/4 39/9 41/5 41/20 41/23 42/2 42/13 42/18 43/1 43/5 43/12 43/15 43/19 44/15 44/20 46/22 47/6 48/20 48/24 48/24 49/4 49/6 49/23 49/25 50/1 50/7 50/8 50/12 51/5 51/8 51/12 51/23 52/2 52/7 53/2 53/13 53/15 55/4 60/15 63/19 64/14 64/18 65/1 65/18 66/5 66/7 70/7 70/18 70/23 75/3 75/16 84/21 87/9 90/17 91/6 91/13 92/2 92/5 92/10 93/11 94/9 94/14 94/19 95/10 95/24 96/1 99/12 101/3 101/10 102/7 102/10 115/19 118/15 119/8 129/14 131/10 149/2 150/12 150/15 150/17 150/19 150/22 150/24 151/2 153/2 153/3 153/12 153/15 153/17 153/17 153/20 154/1 154/3 154/12 154/15 154/18 154/20 154/23 154/25 155/9 155/11 155/14 155/21 156/14 156/17 157/11 158/16 158/20 158/23 159/7 164/5 164/6 165/9 167/8 167/12 172/11 172/21 172/25 173/3 173/8 174/4 174/14 174/17 175/13 175/21 175/23 175/24 176/3 176/9 176/11 176/13 176/17 176/18 176/21 176/22 176/25 177/2 177/15 177/17 182/5 182/5 182/17 182/24 183/9 183/12 183/17 183/25 184/11 184/16 184/24 185/13 187/3	
Naval Academy [1]	175/21	
Navy [17]	6/8 7/9 16/18 23/1 23/3 23/14 27/14 33/19 33/20 34/1 34/8 35/21 36/21 36/3 36/10 36/12 37/5 38/2 45/9 46/22 46/6 62/4 62/13 62/13 62/17 63/3 64/16 76/21 89/12 89/14 89/22 104/13 112/21 112/25 117/15 117/15 121/11 121/15 122/17 123/12 129/16 129/18 131/12 131/13 133/9 133/13 134/3 134/23 135/12 136/9 143/6 147/19 150/16 150/18 150/25 150/25 154/5 154/14 155/21 156/4 156/16 157/9 157/10 159/1 159/3 159/14 159/19 159/21 160/20 161/4 161/5 161/7 161/8 162/8 163/11 163/13 163/13 164/11 164/14 164/16 164/18 164/20 164/24 165/1 165/14 165/20 165/21 165/23 166/5 170/8 171/4 171/8 171/13 171/23 175/4 175/7 176/9 177/4 177/7 177/8 177/16 178/8 178/12 179/18 180/20 181/8 181/12 181/16 181/20 181/24 182/2 182/3 183/5 183/13 183/18 184/1 185/9 185/10	
Navy's [7]	89/19 135/14 156/14 158/14 167/1 174/25 175/11	
NCOs [1]	134/8	
nearby [1]	161/18	
nearly [2]	47/15 171/5	
necessarily [5]	10/8 16/14 69/7 69/13 83/21	
need [5]	54/4 110/2 110/3 117/9 137/5	
needed [4]	117/3 148/15 159/17 165/18	
needs [5]	50/16 116/8 116/20 117/1 122/20	
negatively [1]	144/8	
Negroes [1]	121/13	
Neither [1]	44/6	
never [6]	15/19 51/13 53/14 117/18 126/15 142/14	
nevertheless [2]	66/8 69/10	
new [7]	99/14 107/5 121/10 121/11 138/13 151/8 180/20	
newest [1]	104/8	
Newport [2]	175/22 187/2	
newspaper [1]	119/4	
newspapers [1]	139/25	
NEX [2]	29/4 31/4	
next [29]	9/1 17/8 17/12 17/14 17/17 17/21 17/22 18/1 27/8 59/25 60/14 61/8 69/9 69/10 72/14 97/10 98/10 99/6 100/14 100/23 103/18 103/23 149/16 149/19 187/13 187/14 187/23 188/2 188/2	
Ngulifack [1]	84/23	
NHHC [1]	156/3	
nice [6]	62/6 103/22 104/3 104/17 112/8 178/1	
Nicolas [1]	169/7	
NIL [5]	76/25 77/4 99/7 99/22 99/25	
nine [2]	90/2 109/10	
Nixon [2]	165/1 170/4	
no [79]	1/4 3/20 3/21 4/11 8/8 9/12 12/14 12/16 12/17 15/22 15/25 16/6 32/1 39/5 40/18 41/2 44/24 47/13 47/15 47/23 48/20 51/24 52/1 59/10 59/10 59/15 60/5 62/12 63/1 82/17 82/19 87/6 88/16 88/16 89/2 91/7 91/24 92/3 92/6 102/24 103/2 103/4 103/5 112/3 112/4 115/18 115/20 129/15 139/11 139/12 141/4 141/15 142/13 142/22 146/15 146/19 149/10 156/21 159/4 159/6 159/8 159/11 159/23 160/14 164/19 173/2 177/5 180/16 181/22 183/4 183/11 183/16 183/24 184/9 185/2 188/7 190/12 190/12 191/5	
NOAH [3]	1/23 7/21 124/16	
Nobody [1]	66/18	
Nokia [1]	16/3	
nominated [1]	173/10	
nomination [1]	138/18	
nominees [1]	138/22	
non [3]	68/23 76/4 78/14	
non-Caucasian [1]	68/23	
non-graduation [1]	78/14	
non-varsity [1]	76/4	
none [4]	16/7 117/15 135/12 163/25	
nonjudicial [1]	31/9	
nonprofit [1]	66/6	
nontraditional [3]	70/9 89/18 117/6	
normal [4]	74/12 89/15 98/1 189/4	
normalize [3]	82/14 82/15 83/1	
normalized [1]	82/20	
normally [3]	80/18 86/19 93/19	
NORRIS [1]	1/14	
North [2]	169/21 170/3	
North Vietnam [1]	169/21	
North Vietnamese [1]	170/3	
NORTHERN [2]	170/3	
Northwestern [1]	106/1	
not [197]		
note [3]	62/17 83/19 100/23	
noted [2]	185/20 186/8	
notes [4]	1/24 55/9 55/11 102/6	
nothing [10]	16/25 17/3 52/6 59/18 137/25 149/7 185/5 187/7 187/9 191/8	
notices [1]	189/9	
notion [1]	134/10	
notwithstanding [2]	66/12 66/15	
now [42]	11/3 14/21 18/4 35/23 48/8 48/11 48/20 57/25 58/2 58/15 68/17 69/9 72/17 73/7 73/11 76/25 80/22 81/2 81/5 81/20 84/19 85/6 86/5 96/19 100/4 102/1 102/12 105/12 108/17 128/6 128/9 140/16 161/9 164/5 168/20 170/18 181/1 182/1 187/16 188/5 191/16 191/21	
NROTC [4]	175/13 175/21 176/2 176/16	
nuclear [1]	169/3	
number [39]	37/4 47/16 49/5 49/14 49/17 49/19 74/5 74/13 81/14 83/11 86/1 94/13 118/7 135/7 135/18 137/16 138/3 138/7 139/4 145/20 145/25 154/21 157/22 162/17 164/13 165/3 166/18 169/11 170/21 173/11 174/4 174/19 174/20 174/21 175/12 182/2 182/21 184/10 187/1	
numbered [8]	24/10 24/10 58/2 58/15 58/16 190/14 190/16 190/18	
Numbered 785 [1]	58/2	
numbering [1]	8/8	
numbers [4]	24/8 66/25 85/17 138/8	
numerous [2]	24/24 46/23	
nurse [2]	117/14 117/16	
nurses [5]	117/9 117/12 117/15 117/17 117/19	
O		
O'CONNOR [2]	1/22 1/23	
oath [1]	10/13	
objection [8]	43/24 54/16 54/18 54/23 55/5 55/6 59/8 59/11	
objectives [2]	27/3 28/12	
objects [1]	4/2	
obligation [1]	78/4	
observed [1]	77/4	
obstacle [1]	37/8	
obtain [1]	151/24	
obtained [2]	64/12 142/1	
obvious [1]	62/16	
obviously [4]	80/24 125/24 133/12 189/4	
occasionally [1]	67/2	
occur [1]	29/14	
occurred [6]	41/5 62/20 144/11 146/13 163/6 165/6	
occurrences [1]	13/10	
occurs [1]	79/14	
ocean [1]	171/20	
OCS [1]	175/21	
October [3]	151/4 169/24 170/1	
October 12th [1]	169/24	
October 23rd [1]	170/1	
OD [2]	122/1 122/1	
odd [1]	24/10	
odd-numbered [1]	24/10	
off [8]	3/4 13/7 47/19 75/21 130/19 168/19 169/15 188/15	
offense [1]	180/14	
offer [6]	97/25 98/20 101/15 146/21 157/13 157/16	
offered [3]	4/6 124/13 184/9	
offering [13]	114/15 114/18 115/7 115/12 115/16 115/19 118/16 147/24 158/9 159/3 159/5 159/7 159/9	
offers [1]	121/12	
office [11]	65/23 65/23 66/1 89/19 110/5 132/21 133/20 150/19 150/24 167/12 173/22	
officer [67]	5/18 7/2 7/6 14/23 15/1 21/18 22/21 23/24 24/14 25/15 25/15 25/17 25/18 25/20 25/21 25/22 25/23 26/18 26/18 26/25 27/10 27/11 27/14 29/19 30/15 32/18 32/23 33/18 34/13 35/24 35/25 36/13 38/10 39/20 39/22 40/1 41/7 41/11 48/9 52/11 57/6 58/1 64/18 64/19 75/3 84/12 89/13 133/23 134/20 135/12 158/14 158/19 159/1 164/4 166/13 167/3 170/15 174/22 175/1 175/11 175/13	





<b>P</b>	<b>pointed</b> [2] 86/12 134/23	<b>preventing</b> [1] 177/15
<b>performance</b> [19] 19/12/12 27/12/12 30/12/12 46/24 46/25 47/1 47/21 50/17 90/15	<b>police</b> [2] 130/6 130/6	<b>previous</b> [3] 46/12 78/15 157/18
<b>performed</b> [3] 159/19 166/4 169/3	<b>policy</b> [5] 14/18 48/15 50/5 116/15	<b>prevailing</b> [2] 65/6 122/14 18
<b>performing</b> [1] 170/22	<b>pool</b> [1] 138/22	<b>pride</b> [1] 125/8
<b>perhaps</b> [4] 17/7 59/24 100/1 117/5	<b>poor</b> [1] 117/22	<b>primarily</b> [14] 28/3 28/6 65/23 66/2 69/20 74/10 86/18 97/6 119/9 126/20 128/23 143/19 147/15 160/2
<b>period</b> [29] 26/19 32/9 33/13 72/4 72/8 72/12 77/11 86/2 86/3 107/4 116/18 128/21 139/18 140/20 145/4 147/14 148/25 153/13 153/20 156/1 161/10 163/12 165/13 179/7 180/15 181/17 183/2 183/3 183/10	<b>popular</b> [3] 45/14 45/15 92/24	<b>primary</b> [9] 65/25 66/5 98/4 98/22 101/9 112/17 126/25 155/2 169/2
<b>periods</b> [1] 154/1	<b>population</b> [1] 76/6	<b>printed</b> [1] 67/18
<b>permanent</b> [1] 129/9	<b>port</b> [11] 16/15 119/7 119/8 161/14 161/18 161/20 161/23 161/24 162/13 162/15 171/1	<b>prior</b> [8] 10/10 86/19 93/6 97/16 99/11 105/24 148/24 160/14
<b>permission</b> [1] 60/2	<b>portal</b> [4] 76/24 99/7 99/9 99/17	<b>prioritize</b> [2] 81/25 82/2
<b>perpetrators</b> [5] 29/16 31/8 38/18 39/9 41/9	<b>portion</b> [10] 67/8 93/7 94/3 99/5 124/12 129/5 129/7 137/6 139/22 143/10	<b>prioritizes</b> [1] 82/6
<b>persistence</b> [1] 139/11	<b>portions</b> [1] 98/13	<b>priority</b> [1] 88/21
<b>person</b> [11] 4/14 9/18 28/15 58/20 64/6 69/16 74/15 83/5 84/20 168/13 186/16	<b>posed</b> [1] 150/24	<b>prisoners</b> [1] 129/4
<b>person's</b> [1] 45/6	<b>position</b> [16] 12/10 12/11 29/21 30/23 30/24 31/24 31/24 33/4 35/1 65/18 105/6 107/2 107/8 120/5 151/3 152/23	<b>private</b> [4] 4/1 185/21 186/9 186/9
<b>personal</b> [3] 9/6 9/15 122/17	<b>positions</b> [6] 15/14 24/13 119/21 160/3 177/12 187/1	<b>privilege</b> [1] 103/14
<b>personally</b> [1] 183/24	<b>positive</b> [10] 4/17 4/20 4/23 5/2 5/6 5/10 33/5 84/18 122/9 135/5	<b>probably</b> [13] 19/25 20/15 21/10 22/6 37/12 45/12 77/24 93/4 101/25 148/19 149/13 163/6 188/6
<b>personnel</b> [1] 23/14	<b>possess</b> [1] 75/2	<b>problem</b> [15] 11/18 56/3 69/11 69/13 69/24 115/11 123/3 123/15 125/13 125/14 131/16 134/11 135/20 137/14 138/1
<b>pervasive</b> [1] 123/6	<b>post</b> [2] 129/2 153/25	<b>problematic</b> [1] 11/20
<b>petty</b> [2] 167/3 167/3	<b>postgraduate</b> [1] 187/3	<b>problems</b> [9] 76/18 121/2 125/17 125/18 131/12 132/24 163/7 174/25 181/1
<b>Ph.D</b> [5] 106/9 106/21 142/1 152/2 152/17	<b>potatoes</b> [1] 160/10	<b>procedure</b> [1] 4/15
<b>phenomenon</b> [1] 74/8	<b>potential</b> [7] 43/19 44/20 45/3 47/4 138/22 164/1 164/3	<b>proceeds</b> [1] 121/24
<b>Philippines</b> [3] 163/18 169/21 172/9	<b>potentially</b> [3] 45/4 47/5 71/1	<b>proceed</b> [6] 3/13 19/4 40/11 59/12 61/19 114/3
<b>philosophy</b> [1] 152/2	<b>Powell</b> [1] 121/10	<b>proceedings</b> [1] 192/8
<b>phone</b> [1] 16/3	<b>power</b> [5] 168/17 170/2 170/9 180/16 181/23	<b>process</b> [25] 4/10 31/6 39/10 42/1 42/19 43/2 43/6 43/22 44/11 46/21 47/15 48/7 49/5 49/9 56/12 93/23 119/25 120/2 120/11 120/11 134/5 149/3 184/12 184/17 184/25
<b>phones</b> [1] 16/4	<b>powerful</b> [5] 35/20 116/13 118/25 146/23 177/19	<b>produce</b> [1] 49/16
<b>photograph</b> [1] 119/7	<b>practical</b> [2] 140/24 140/25	<b>produced</b> [2] 171/21 182/8
<b>phrase</b> [1] 121/25	<b>practice</b> [1] 184/19	<b>produces</b> [1] 177/17
<b>phrased</b> [1] 54/22	<b>practiced</b> [1] 164/11	<b>productive</b> [1] 191/10
<b>physical</b> [7] 21/19 22/13 43/17 73/24 86/13 90/24 173/12	<b>practices</b> [2] 34/20 125/14	<b>profession</b> [1] 5/6
<b>physically</b> [3] 32/3 96/2 96/6	<b>practicing</b> [1] 178/9	<b>professional</b> [2] 109/13 110/14
<b>pick</b> [2] 19/16 164/16	<b>Prairie</b> [1] 175/14	<b>professionals</b> [1] 34/9
<b>picking</b> [1] 86/23	<b>Preble</b> [1] 154/21	<b>professor</b> [46] 61/2 84/17 84/17 105/4 105/7 105/11 106/22 107/1 107/9 107/10 107/20 108/8 110/16 111/25 112/5 112/8 112/10 112/20 113/13 114/6 114/14 115/2 118/20 119/23 122/6 122/24 124/10 124/20 126/12 127/25 128/16 131/2 132/8 134/19 137/12 139/17 140/16 141/17 141/19 141/21 164/5 173/22 185/7 185/20 186/8 187/10
<b>picture</b> [3] 29/9 131/20 170/8	<b>precise</b> [1] 101/2	<b>Professor Arcidiacono</b> [1] 61/2
<b>piecemeal</b> [1] 120/2	<b>precisely</b> [1] 176/11	<b>Professor Bailey</b> [4] 105/4 108/8 112/8 185/20
<b>pilots</b> [1] 152/5	<b>predecessor</b> [1] 153/3	<b>Professor Beth Bailey</b> [1] 111/25
<b>pin</b> [1] 23/15	<b>predict</b> [3] 149/6 159/9 184/20	<b>Professor Sherwood</b> [1] 185/7
<b>pipe</b> [1] 16/11	<b>predicting</b> [3] 184/13 184/15 184/23	<b>professor's</b> [1] 60/24
<b>pipeline</b> [2] 176/1 185/19	<b>prediction</b> [1] 149/1	<b>professorship</b> [1] 105/13
<b>pivot</b> [1] 75/21	<b>predictor</b> [1] 83/4	<b>professorships</b> [2] 105/15 105/16
<b>place</b> [5] 104/10 126/22 131/10 138/6 148/24	<b>predominant</b> [1] 170/9	<b>profound</b> [4] 121/2 130/4 135/11 145/13
<b>placement</b> [1] 35/11	<b>predominantly</b> [1] 182/21	<b>profoundly</b> [1] 123/22
<b>places</b> [3] 118/13 124/8 126/19	<b>preexisting</b> [1] 156/2	<b>prognosticate</b> [1] 149/6
<b>plaintiff</b> [9] 1/4 1/12 18/11 18/13 44/4 60/16 60/18 103/25 191/4	<b>prefer</b> [3] 4/2 141/18 190/18	<b>program</b> [7] 76/17 93/24 134/4 165/16 173/18 175/16 176/16
<b>plaintiff's</b> [16] 2/4 53/25 54/2 58/16 66/23 71/15 83/12 87/13 96/19 100/4 102/1 102/12 102/15 124/20 157/3 157/11	<b>preference</b> [5] 3/20 3/21 3/22 47/10 61/23	<b>programs</b> [9] 109/12 133/25 138/10 138/14 138/23 145/19 175/12 176/15 182/10
<b>plaintiffs</b> [1] 63/14	<b>preferences</b> [2] 50/13 51/5	<b>project</b> [5] 114/10 165/16 182/11 182/14 188/1
<b>plan</b> [4] 135/3 146/1 146/4 187/24	<b>preferred</b> [1] 190/10	<b>projects</b> [4] 35/12 66/4 110/20 110/21
<b>planes</b> [1] 171/16	<b>pregnancy</b> [1] 12/19	<b>promise</b> [1] 132/14
<b>plans</b> [1] 135/6	<b>prejudices</b> [1] 144/4	<b>promising</b> [1] 175/17
<b>platoon</b> [4] 24/14 24/15 25/3 25/4	<b>preliminary</b> [1] 157/4	<b>promotion</b> [6] 122/12 122/13 166/20 179/23 181/6 181/10
<b> platoons</b> [3] 24/24 25/1 25/2	<b>prep</b> [2] 49/25 175/25	<b>promptly</b> [1] 30/25
<b>play</b> [8] 5/12 70/24 92/25 99/9 101/2 101/5 101/11 129/12	<b>preparatory</b> [5] 20/19 20/21 23/4 138/23 175/19	<b>prone</b> [1] 127/13
<b>played</b> [10] 97/15 99/7 99/7 100/24 120/21 125/3 126/14 148/2 176/11 177/15	<b>prepare</b> [2] 71/23 112/10	<b>pronounce</b> [2] 60/25 61/4
<b>player</b> [1] 129/12	<b>prepared</b> [3] 68/2 114/6 158/1	<b>properly</b> [1] 51/15
<b>players</b> [6] 76/19 76/23 99/21 100/17 101/3 102/10	<b>preparing</b> [6] 112/14 112/21 155/24 157/2 160/9 162/19	<b>proportions</b> [1] 132/12
<b>playing</b> [1] 99/19	<b>presence</b> [2] 36/19 148/3	<b>proposed</b> [2] 190/5 190/11
<b>please</b> [34] 3/6 3/10 3/10 7/21 18/23 18/25 19/10 21/16 29/24 50/21 51/7 61/14 70/3 70/5 73/12 74/22 84/10 86/8 104/22 104/22 104/24 106/19 113/14 114/17 115/2 115/7 115/12 124/16 149/23 150/9 153/19 154/17 181/9 183/15	<b>present</b> [7] 1/20 12/18 12/19 38/22 58/10 154/8 184/14	<b>proposition</b> [1] 171/17
<b>pleased</b> [1] 191/10	<b>presentation</b> [3] 56/16 57/25 86/24	<b>protect</b> [1] 169/2
<b>pleasure</b> [2] 40/19 60/12	<b>presentations</b> [1] 151/1	<b>protest</b> [1] 170/16
<b>plenty</b> [1] 189/22	<b>president</b> [3] 42/13 165/1 174/14	<b>protested</b> [1] 161/19
<b>plus</b> [1] 167/9	<b>President Johnson</b> [1] 174/14	<b>protracted</b> [1] 120/2
<b>PME</b> [1] 109/13	<b>President Nixon</b> [1] 165/1	<b>provide</b> [14] 32/14 33/25 37/6 39/14 65/25 102/25 109/11 155/16 160/22 161/16 164/23 176/4 176/15 190/2
<b>poach</b> [3] 137/17 185/21 186/8	<b>presidential</b> [1] 23/21	<b>provided</b> [4] 7/20 84/16 84/25 177/9
<b>Pocahontas</b> [1] 39/17	<b>press</b> [4] 136/19 136/19 136/19 140/3	
<b>podcast</b> [2] 151/1 154/22	<b>pressure</b> [2] 121/21 170/2	
<b>point</b> [36] 13/4 20/4 28/13 28/13 37/12 73/13 79/6 80/22 94/5 97/3 97/13 98/11 98/12 109/10 123/8 129/1 129/3 129/14 130/16 132/20 133/16 137/22 138/1 145/6 145/16 145/21 145/25 155/16 170/10 186/13 188/3 188/9 189/13 189/14 191/4 191/6	<b>presumably</b> [1] 41/12	
	<b>presume</b> [1] 76/11	
	<b>pretend</b> [1] 39/18	
	<b>pretrial</b> [1] 190/17	
	<b>pretty</b> [5] 37/15 55/10 90/4 120/4 170/9	
	<b>prevalent</b> [1] 167/13	
	<b>prevent</b> [1] 120/25	
	<b>prevented</b> [1] 173/14	

**P**  
provider [1] 170/9  
provides [3] 36/19 176/14 176/16  
providing [1] 148/21  
provoked [1] 129/25  
provoking [1] 136/16  
prowess [1] 94/25  
public [23] 14/18 20/4 20/9 48/15 62/12  
62/17 109/14 115/14 116/8 116/9 118/23  
119/15 121/4 130/14 136/18 137/7 137/11  
139/16 139/22 139/24 140/5 140/6 155/8  
public's [1] 118/20  
public-facing [1] 109/14  
publically [1] 133/7  
publications [3] 110/25 111/4 143/5  
publicly [1] 132/22  
publish [1] 80/18  
published [6] 80/18 110/23 120/22 121/10  
155/6 155/14  
publishes [1] 109/16  
Puerto [1] 127/9  
Puerto Rican [1] 127/9  
pull [5] 7/21 9/20 10/15 11/3 11/23  
pulled [6] 16/15 79/21 79/23 80/3 169/17  
170/10  
punished [1] 39/12  
punishment [2] 31/9 31/13  
purpose [1] 108/21  
purposes [1] 114/10  
pursuant [1] 192/6  
pursue [1] 76/20  
PUSTERLA [1] 1/23  
put [13] 34/22 35/1 35/20 54/6 74/20  
87/25 102/12 123/13 125/15 147/17 168/21  
170/2 186/10  
putting [4] 62/23 95/8 95/16 96/11  
PX [1] 122/18

**Q**  
Qualification [1] 58/4  
qualified [16] 23/14 43/23 43/23 44/12  
44/12 44/15 44/23 45/7 45/7 54/14 55/3  
56/9 59/7 111/25 156/13 182/9  
qualitative [1] 164/11  
qualities [3] 95/23 96/1 96/17  
quality [3] 4/17 4/23 5/6  
quantities [1] 16/13  
quarantined [1] 97/23  
quell [1] 164/2  
quelled [1] 164/1  
quelling [1] 168/14  
question [42] 11/7 38/1 44/9 44/22 46/11  
46/12 46/18 47/11 50/21 51/7 51/18 51/25  
52/16 52/20 53/6 53/8 53/9 53/10 53/12  
54/22 55/5 55/12 55/19 59/10 59/13 69/9  
69/10 74/22 77/8 78/25 79/7 133/23  
140/16 179/20 181/9 183/15 183/23 185/6  
186/2 186/7 187/6 190/9  
questions [12] 59/15 69/2 73/10 73/11  
89/2 103/5 110/3 141/4 150/24 154/7  
185/2 191/11  
quickly [2] 128/25 134/5  
quite [14] 4/4 16/11 37/9 60/11 69/18  
70/10 70/22 95/4 95/6 95/16 99/21 118/9  
154/22 180/10  
quote [3] 121/9 121/12 186/5  
quoted [1] 168/17  
quotient [2] 85/12 87/20

**R**  
race [97] 8/18 9/4 9/13 9/18 28/25 30/1  
30/3 30/14 32/12 33/3 33/23 34/5 35/20  
36/7 42/19 43/1 43/5 44/14 44/17 44/17  
44/21 44/22 44/24 45/5 49/4 49/11 49/24  
50/3 50/8 50/19 50/22 51/9 51/13 51/24  
52/2 52/6 52/10 52/22 53/1 53/12 53/14  
53/17 54/13 55/2 55/17 56/1 56/7 59/3  
59/6 68/20 68/21 68/25 71/5 71/19 72/1  
84/3 85/7 86/21 113/4 115/11 118/15  
123/3 123/15 131/15 131/21 133/2 133/3  
133/12 133/17 133/18 133/23 134/1 134/6  
134/8 134/15 134/17 134/17 135/6 135/20  
144/19 145/6 146/6 146/10 146/13 149/2  
154/19 156/14 156/15 160/25 161/1 163/10  
164/3 170/11 179/3 184/11 184/17 184/25  
Race/Ethnic [1] 84/3  
raced [1] 119/11  
races [4] 34/9 72/18 122/21 182/15  
RACHAEL [2] 1/14 141/12  
racial [158] 6/18 7/1 7/5 7/9 7/13 9/22

29/12 33/10 36/12 39/19 39/22 39/25 40/3  
40/5 50/13 51/5 58/23 115/4 115/9 115/9  
118/8 118/11 118/11 117/21 117/21 117/21  
118/11 118/18 119/4 120/15 120/18 121/7  
122/3 123/1 123/1 123/5 123/6 123/8  
123/16 124/2 125/3 125/17 125/23 126/13  
126/14 126/17 126/19 126/22 126/23 127/2  
127/5 127/6 127/16 127/16 128/18 128/20  
128/22 129/2 129/11 129/13 129/15 130/1  
130/4 131/1 131/16 131/16 131/18 132/1  
132/1 132/9 132/17 132/24 133/17 135/21  
136/16 136/16 137/8 138/25 139/6 139/11  
139/11 139/12 140/11 141/1 141/2 142/24  
143/13 143/16 143/22 144/4 144/11 144/16  
145/11 145/11 145/13 145/15 146/16  
146/19 146/21 146/24 146/25 148/3 148/4  
148/5 148/18 148/25 153/23 154/20 157/9  
157/10 158/15 159/2 159/13 160/12 160/19  
160/24 161/13 162/7 162/22 162/25 163/2  
163/9 163/13 164/20 165/19 166/5 166/9  
167/7 167/15 171/4 172/10 172/13 172/16  
173/25 174/25 177/3 177/6 177/13 177/16  
178/11 178/14 178/18 178/19 178/23  
179/16 180/2 181/7 181/11 181/15 181/16  
181/19 181/23 183/5 183/13 183/17 184/1  
184/16 184/24  
racially [10] 36/24 37/3 38/8 38/14  
166/21 173/24 180/4 180/6 181/18 181/18  
racially-based [1] 166/21  
racism [17] 12/22 13/9 29/5 51/6 51/14  
120/21 126/9 131/9 140/3 140/4 162/6  
166/21 173/6 173/13 173/13 180/1 181/14  
racist [3] 37/14 37/15 120/20  
racks [1] 168/5  
radio [1] 118/17  
Raise [1] 61/12  
raises [1] 66/6  
raising [1] 18/23  
ran [1] 56/18  
random [1] 127/9  
range [2] 119/21 143/9  
ranges [1] 47/7  
rank [15] 3/23 3/24 21/20 22/4 22/14  
23/8 49/2 60/18 61/25 62/9 62/12 62/17  
64/3 167/22 186/11  
ranked [2] 47/16 88/6  
ranking [3] 49/3 177/2 187/23  
ranks [4] 137/6 139/4 175/2 175/2  
rate [22] 68/20 71/5 71/7 71/7 71/8 71/9  
71/12 71/13 71/18 72/2 72/8 72/11 72/14  
75/24 77/20 78/10 78/14 79/5 80/7 80/16  
97/5 166/1  
rates [7] 68/5 69/25 74/17 76/10 77/10  
78/17 82/23  
rating [1] 166/2  
ratio [1] 85/12  
raw [3] 82/21 82/23 87/5  
RDB [1] 1/5  
reach [2] 113/10 156/10  
reached [1] 92/20  
reacted [2] 53/18 53/19  
reaction [1] 124/24  
read [8] 37/24 52/15 52/17 53/7 86/10  
86/10 154/19 154/20  
readiness [11] 25/19 25/24 33/20 86/14  
90/24 115/5 116/2 116/18 158/16 158/20  
172/11  
reading [7] 40/25 68/14 88/5 97/4 112/18  
125/2 153/9  
ready [2] 189/19 189/20  
real [5] 5/12 64/17 180/16 181/22 189/1  
realize [1] 188/15  
realized [1] 138/1  
really [29] 10/7 11/11 19/21 28/19 28/20  
33/5 33/13 34/21 34/22 38/23 40/25 41/3  
48/7 55/23 61/7 62/24 75/18 75/19 76/16  
93/20 93/20 98/23 133/21 134/12 145/24  
172/7 189/8 189/21 190/12  
Realtime [1] 192/5  
rear [2] 57/19 124/8  
reason [17] 49/22 60/5 76/12 77/25 80/9  
87/6 88/15 88/17 88/18 91/5 91/12 92/4  
93/11 98/4 101/9 134/10 180/6  
reasonable [5] 42/25 43/3 43/4 43/7  
85/18  
reasonably [2] 48/9 188/1  
reasons [16] 75/17 90/16 90/18 91/7  
91/15 91/17 91/25 98/9 98/21 98/22  
100/18 135/19 162/6 170/11 177/13 178/3  
reassignments [1] 31/18

recall [22] 19/25 20/15 22/17 29/17 30/9  
31/8 32/7 37/7 37/9 37/20 39/11 41/24  
44/17 48/11 101/6 116/21 157/22 80/4 82/15  
102/14 157/2 182/3  
receive [6] 99/25 111/11 136/3 136/12  
167/22 176/8  
received [17] 57/13 59/5 106/21 107/20  
107/24 107/24 108/2 108/3 108/4 108/6  
111/7 111/10 111/17 111/19 111/21 155/11  
155/13  
receiving [1] 190/11  
recent [3] 38/7 105/21 111/19  
recently [2] 38/10 153/24  
recess [7] 80/23 81/1 81/3 81/4 128/4  
128/7 128/8  
recognition [5] 23/20 111/7 111/10  
133/15 155/11  
recognize [4] 96/21 100/6 126/18 127/19  
recommend [3] 43/22 44/11 128/2  
recommendations [1] 5/19  
record [38] 18/9 19/1 19/10 20/3 21/16  
21/25 22/10 23/12 23/18 24/7 30/1 31/11  
35/4 46/8 58/16 61/15 62/23 67/15 74/5  
80/15 89/5 92/9 92/17 93/17 93/21 104/24  
114/23 122/16 125/19 129/12 150/2 150/9  
152/13 153/15 154/10 160/6 176/2 176/24  
recorded [1] 39/16  
recording [1] 131/23  
records [3] 67/2 112/17 113/3  
recoupment [1] 78/4  
recruit [4] 165/22 174/18 182/18 186/9  
recruited [4] 92/17 93/3 105/15 164/16  
recruiters [1] 182/22  
recruiting [2] 92/21 182/7  
recruitment [5] 40/1 164/12 165/2 165/4  
165/17  
recruits [2] 165/23 165/23  
recycled [1] 56/21  
Red [1] 160/23  
redirect [7] 2/10 17/2 59/17 103/7 103/9  
149/9 185/4  
reduced [1] 167/22  
reducing [1] 146/24  
reemergence [1] 141/1  
refer [1] 66/22  
reference [1] 189/9  
references [1] 188/24  
referred [2] 67/21 124/12  
referring [3] 46/3 59/2 161/17  
refers [2] 153/17 154/12  
reflect [2] 29/12 38/3  
reflected [1] 78/15  
reflects [2] 8/17 59/6  
reforms [3] 138/24 139/2 139/5  
refused [3] 119/16 120/4 143/25  
regard [1] 112/7  
regarding [1] 41/4  
regardless [2] 34/24 34/25  
regimens [1] 144/9  
Regiment [1] 120/24  
region [1] 90/13  
regions [1] 27/20  
Registered [1] 192/4  
regular [5] 101/14 133/21 176/14 180/2  
181/14  
regularly [2] 45/23 153/8  
regulations [1] 192/10  
reinforce [1] 98/5  
relate [1] 167/6  
related [2] 108/10 108/23  
relating [2] 112/20 133/25  
relations [21] 113/4 133/2 133/3 133/13  
133/17 133/19 133/24 134/1 134/6 134/9  
134/16 134/17 134/18 135/6 146/6 146/10  
154/19 159/13 160/12 162/22 163/10  
relationship [2] 10/9 130/18  
relationships [5] 12/20 28/17 35/8  
130/11 130/25  
relevant [1] 136/20  
relevant [10] 14/4 28/25 29/2 30/14  
32/12 33/23 34/5 36/7 86/2 153/5  
reliance [1] 156/9  
relied [1] 113/2  
relieved [2] 120/5 132/23  
reluctant [1] 161/6  
rely [2] 156/1 164/18  
remain [3] 38/4 38/4 61/10  
remember [19] 10/10 54/15 55/4 56/9  
56/10 56/16 56/17 56/17 56/20 58/5 58/6  
63/23 68/15 83/8 84/1 86/9 86/12 86/25

**R**  
remember [1] 193/15  
reminder [1] 38/21  
removed [1] 99/20  
removing [2] 32/3 122/3  
rendered [1] 168/17  
repair [1] 169/22  
repeat [7] 10/3 44/9 47/11 179/20 181/9 183/15 183/23  
repeated [1] 117/17  
repeatedly [2] 117/12 127/13  
rephrase [1] 74/22  
replenishment [1] 169/22  
report [27] 72/23 80/11 80/18 83/8 83/22 84/2 84/2 84/15 85/1 85/3 86/10 110/4 112/10 112/14 112/21 124/12 133/20 134/22 146/17 147/1 147/12 147/14 147/24 148/22 148/23 150/19 157/21  
reported [6] 1/24 29/20 85/11 119/4 166/9 192/8  
Reportedly [1] 119/10  
Reporter [7] 52/15 52/17 53/7 192/1 192/4 192/5 192/16  
reporting [3] 140/3 140/9 140/13  
reports [5] 72/21 119/4 119/14 155/7 157/18  
represent [5] 23/17 23/19 93/7 94/3 141/12  
representation [5] 87/20 158/14 158/18 158/25 175/1  
representative [1] 13/5  
representing [1] 80/1  
represents [1] 23/12  
reputation [2] 8/17 28/21  
requested [1] 52/17  
require [1] 144/1  
required [3] 131/25 133/16 146/3  
requirement [1] 133/2  
requiring [2] 135/2 137/4  
research [14] 84/15 105/20 106/15 107/20 108/21 111/21 112/17 113/3 125/1 139/7 140/19 146/6 150/23 156/2  
resemblance [1] 68/9  
reserve [7] 175/13 176/3 176/8 176/9 176/10 176/15 176/16  
Residential [1] 108/5  
resignations [2] 74/11 78/7  
resigned [1] 39/7  
resilience [2] 95/14 96/8  
resistance [1] 120/3  
resisted [1] 116/20  
resolved [1] 80/8  
resonate [1] 37/23  
resources [1] 116/5  
respect [8] 3/24 54/16 60/8 77/10 82/4 121/14 124/25 185/18  
respectively [1] 88/12  
respects [1] 170/21  
respond [1] 131/5  
responded [1] 131/7  
response [3] 26/19 145/13 157/11  
responses [1] 144/13  
responsibilities [4] 31/25 32/1 32/1 150/21  
responsibility [1] 35/1  
responsible [3] 27/1 33/19 126/7  
restricted [3] 117/19 126/1 127/18  
result [2] 118/1 165/14  
results [2] 166/16 167/5  
resumes [2] 81/6 128/10  
reswear [1] 3/5  
resworn [1] 3/6  
retain [2] 8/19 8/21  
retained [2] 39/11 39/12  
retention [2] 40/3 71/3  
retire [2] 5/25 89/22  
retired [4] 14/10 60/19 61/24 62/3  
retirement [2] 66/12 66/15  
return [2] 53/22 171/24  
review [4] 43/16 56/19 113/8 124/10  
reviewed [2] 110/25 111/2  
reviewing [1] 6/15  
revolution [2] 142/10 154/13  
revolve [1] 65/24  
Rhode [1] 175/22  
ribbon [1] 23/21  
ribbons [4] 23/16 23/17 23/19 23/22  
Rican [1] 127/9  
RICHARD [1] 1/9  
ricocheting [1] 169/13

**rid** [1] 122/8  
**rigged** [4] 10/1 10/6 10/8 10/23  
**right** [1] 5/21 10/1  
13/13 13/14 13/23 14/13 14/21 15/8 15/13 15/23 15/25 16/6 16/9 16/25 17/4 17/9 17/18 17/20 18/17 18/18 18/23 25/10 33/12 38/2 42/14 45/13 45/20 46/21 47/10 47/14 52/8 53/15 54/4 58/9 58/12 59/1 59/16 59/19 60/11 61/9 61/12 62/22 64/6 64/21 65/15 68/12 72/24 73/3 73/7 73/16 73/24 74/13 74/21 76/21 82/18 82/24 83/2 83/6 83/10 85/16 87/5 88/21 91/10 100/4 109/4 109/5 112/4 113/18 141/17 141/24 142/14 142/19 142/25 143/7 143/17 143/20 143/21 144/2 144/5 144/9 144/14 145/1 145/7 145/12 145/17 146/2 149/8 149/11 156/22 168/20 185/16 187/18 187/19 187/22 188/1 188/3 188/5 189/17 190/3 190/7  
**rights** [3] 34/20 118/24 132/21  
**riot** [17] 118/5 118/5 118/15 118/19 127/6 129/6 161/21 163/4 163/6 164/1 164/3 165/6 168/1 168/14 169/6 170/12 171/21  
**rioters** [2] 169/9 169/12  
**riots** [9] 118/20 128/20 139/11 139/13 144/19 158/20 161/1 161/1 179/3  
**rise** [8] 79/10 79/11 81/2 81/5 97/18 128/6 128/9 191/21  
**risk** [6] 7/2 74/21 74/23 75/4 75/12 94/24  
**risks** [2] 7/6 76/13  
**RMR** [2] 1/25 192/16  
**road** [2] 71/1 95/6  
**robberies** [1] 163/9  
**Robert** [2] 156/4 165/15  
**ROBINSON** [1] 1/18  
**role** [21] 35/23 35/25 54/14 65/21 66/20 81/22 97/15 99/8 99/10 99/20 100/24 101/2 120/21 125/3 126/14 148/3 169/4 176/12 177/15 177/17 177/18  
**Ronda** [3] 1/25 192/4 192/16  
**room** [1] 34/11  
**rooms** [2] 70/12 97/23  
**root** [2] 69/19 70/1  
**ROTC** [5] 138/14 138/15 145/19 182/5 182/5  
**roughly** [3] 76/5 88/9 91/22  
**routinely** [1] 46/16  
**rubric** [1] 81/23  
**Rule** [2] 113/21 113/25  
**Rule 805** [1] 113/21  
**Rule 807** [1] 113/25  
**rules** [2] 90/22 113/21  
**rulings** [1] 113/20  
**run** [3] 37/8 42/2 133/9  
**running** [1] 133/11  
**rush** [1] 189/18  
**rushing** [1] 188/14

## S

**S-H-E-R-W-O-O-D** [1] 150/4  
**S-T-E-V-E-N** [1] 61/16  
**saddle** [1] 17/11  
**safe** [1] 121/15  
**said** [29] 10/21 12/8 12/13 37/14 41/7 54/17 55/7 55/8 55/17 75/21 98/25 121/10 121/11 121/13 125/11 129/14 130/9 133/1 133/8 133/10 136/1 136/8 140/13 148/25 163/25 168/19 184/13 186/12 188/17  
**Saigon** [2] 129/3 133/6  
**Sail** [3] 154/6 154/10 154/12  
**sailing** [1] 154/14  
**sailor** [3] 136/1 154/5 180/14  
**sailors** [32] 119/9 119/12 119/15 126/3 159/25 160/1 160/3 161/2 161/10 161/19 161/21 163/18 163/20 163/24 163/24 163/25 165/5 165/7 166/25 167/1 167/19 167/24 168/11 170/22 170/22 179/23 180/5 180/7 180/12 181/3 181/7 181/11  
**SAIS** [1] 26/16  
**salute** [1] 168/17  
**same** [21] 31/25 34/18 34/19 41/15 48/6 51/14 55/5 55/6 62/13 75/1 79/5 91/23 99/6 102/1 119/16 120/8 157/18 166/3 184/22 189/15 191/16  
**Samuel** [1] 111/13  
**San** [1] 171/1  
**sanctions** [1] 31/10  
**sanctuary** [1] 101/12

**Saratoga** [1] 129/21  
**SAT** [3] 82/13 82/16 83/1  
**SATs** [1] 2/15  
**saving** [1] 171/17  
**saw** [5] 74/17 86/19 119/18 164/24 174/14  
**say** [29] 11/1 37/10 42/18 43/3 43/21 47/5 48/9 49/10 53/16 53/19 55/16 57/14 63/3 63/25 66/17 74/22 78/13 78/16 82/19 86/5 87/4 93/4 94/17 95/20 96/2 110/22 143/6 168/21 188/13  
**saying** [9] 5/15 40/23 47/23 56/1 120/15 133/9 136/9 148/14 184/21  
**says** [10] 8/15 8/16 58/20 58/22 67/9 73/4 97/5 97/10 98/12 102/9  
**scale** [2] 21/11 86/21  
**scaled** [2] 164/25 165/22  
**scarce** [1] 48/21  
**schedule** [3] 3/4 26/7 188/11  
**scheduled** [2] 32/5 187/13  
**schedules** [1] 75/7  
**Schmidt** [1] 130/8  
**Schneller** [1] 156/4  
**Scholar** [1] 153/7  
**Scholars** [1] 108/4  
**school** [27] 5/22 19/23 20/20 20/21 23/5 26/13 45/2 50/1 75/19 76/17 80/9 99/13 99/14 99/18 99/18 106/4 106/6 141/24 142/20 142/22 151/11 151/13 151/14 175/22 175/25 187/2 187/3  
**schooler** [1] 45/2  
**schools** [6] 99/12 99/13 99/16 173/15 182/20 182/20  
**science** [3] 21/8 64/13 64/13  
**scope** [6] 43/25 44/2 44/5 44/6 123/19 149/3  
**score** [1] 82/16  
**scorers** [2] 164/17 164/17  
**scores** [9] 4/13 20/1 20/13 21/19 22/11 82/13 83/1 165/5 165/25  
**scoring** [1] 180/7  
**screen** [14] 11/25 54/6 54/8 56/22 67/6 67/12 71/16 74/18 85/16 85/20 87/25 114/11 121/9 188/25  
**screens** [1] 12/2  
**sea** [2] 23/22 90/6  
**seal** [49] 8/3 22/20 22/22 23/14 24/3 24/4 24/8 24/9 24/12 24/13 24/16 24/17 24/18 24/22 24/23 25/5 25/16 25/19 26/1 26/2 26/23 26/25 27/4 28/3 28/23 31/14 31/21 32/6 32/10 32/15 32/18 32/24 36/21 37/13 38/2 45/16 45/23 46/16 47/22 48/3 48/16 48/20 49/1 50/14 51/6 51/14 51/16 51/20 96/5  
**SEALs** [6] 25/3 27/2 45/9 45/13 47/12 47/13  
**search** [1] 107/17  
**seasons** [4] 98/14 98/18 101/6 101/7  
**seat** [3] 3/9 61/14 104/22  
**seated** [3] 18/22 81/8 128/11  
**second** [26] 8/9 12/1 25/23 29/24 57/10 57/15 57/18 63/24 63/25 64/2 64/3 69/10 77/17 77/21 81/14 88/1 98/10 109/20 115/7 122/25 143/2 158/17 158/18 162/21 169/13 171/11  
**second-year** [1] 77/21  
**secondary** [2] 112/18 155/5  
**secondly** [2] 126/4 136/18  
**Secretary** [6] 109/8 109/24 120/4 136/7 165/15 185/24  
**section** [2] 85/6 97/4  
**Section 1A** [1] 97/4  
**sector** [4] 4/1 185/21 186/9 186/10  
**security** [7] 130/3 158/16 158/16 158/21 158/21 169/4 172/17  
**see** [57] 8/23 9/8 11/2 23/10 23/16 28/5 34/21 56/22 57/4 67/9 69/17 69/19 70/1 71/20 72/19 74/6 74/12 75/23 78/17 83/23 85/2 85/4 85/9 85/11 85/24 87/22 88/13 88/25 97/8 97/10 97/13 98/2 98/2 98/3 98/16 100/9 100/10 100/14 100/21 100/23 100/25 102/2 102/6 102/9 102/18 102/18 104/3 122/1 126/8 129/5 131/20 136/11 159/17 174/11 174/12 178/1 180/12  
**seeing** [2] 65/7 125/22  
**seek** [2] 137/16 138/18  
**seem** [2] 126/8 186/7  
**seemed** [1] 132/13  
**seems** [1] 85/18  
**seen** [6] 5/12 82/12 90/7 90/9 90/12 95/4  
**segregated** [11] 116/13 117/20 119/22

S	Shifting [1]	Social [2]
segregated [8] 13/9 14/22 108/2 160/2 161/11 167/20 181/4 181/4	shining [1] 121/16	Societies [1] 108/2
segregating [1] 145/6	ship [1] 121/16	societies [2] 101/16 108/20 111/11 111/20 123/22 124/23 125/24 142/21 178/14 178/24
segregation [16] 115/4 116/1 116/6 117/7 117/24 118/18 119/23 119/25 122/9 144/25 145/8 145/10 148/16 178/9 178/11 178/15	12/15 12/16 12/18 12/19 15/4 15/22 16/11 16/23 89/17 133/9 133/11 163/20 163/24 164/4 165/9 165/11 168/4 168/6 168/22 169/4 169/11 169/18 169/23 180/24	SOCPAC [1] 25/7
select [4] 22/18 75/20 81/24 81/24	ship's [2] 15/19 163/21	Soldier [1] 120/23
selected [1] 22/20	shipmates [1] 168/22	soldiers [2] 126/3 143/19
selection [3] 46/21 47/15 81/17	ships [9] 16/22 70/16 98/3 119/10 160/5 162/1 165/2 171/22 171/24	sole [1] 126/25
Selective [1] 117/2	shirt [1] 168/19	solely [3] 68/22 72/22 126/1
self [4] 14/21 74/1 96/11 125/5	shoes [1] 121/16	Solgere [3] 5/13 5/16 5/17
self-employed [1] 14/21	short [3] 42/3 54/5 156/1	solidarity [2] 161/19 170/23
self-explanatory [1] 74/1	shortage [1] 137/12	solve [5] 115/11 123/3 123/14 125/16 135/20
self-serving [1] 125/5	shorthand [2] 54/25 136/22	solving [1] 174/25
semester [1] 78/16	shortly [1] 129/19	Somali [1] 32/21
semesters [1] 78/16	shot [2] 61/3 90/10	Somalia [5] 28/6 32/17 32/24 51/16 51/20
send [2] 161/7 182/19	should [12] 4/19 5/2 5/9 17/5 40/23 42/18 43/5 62/17 67/9 76/11 91/4 168/18	some [86] 11/14 12/24 17/19 19/22 23/17 23/19 28/7 29/12 30/9 31/18 31/18 31/24 33/5 33/7 35/7 35/9 35/12 37/6 41/12 42/17 43/18 44/17 47/18 48/25 49/12 49/13 66/20 68/9 71/11 71/14 75/3 75/5 76/13 80/5 80/9 80/13 81/23 81/25 82/1 83/21 84/7 84/16 85/11 86/6 86/6 86/19 92/22 93/25 94/24 95/7 95/17 99/13 104/15 104/16 111/2 114/6 125/18 125/25 126/18 132/13 132/18 138/5 139/10 139/22 139/25 145/6 154/4 154/6 155/16 161/2 162/9 164/23 165/24 167/11 167/14 167/14 168/4 169/14 172/1 173/14 173/15 179/21 180/21 180/24 185/13 189/11
senior [8] 27/13 32/25 37/13 132/22 137/23 167/2 177/12 186/16	showed [1] 73/9	somebody [5] 47/12 84/14 86/15 185/23 189/9
seniors [2] 36/6 79/7	showing [4] 57/18 87/8 87/20 136/4	someone [8] 31/21 31/23 38/8 38/22 54/13 83/4 132/13 160/8
sense [9] 8/5 8/6 22/23 79/5 125/8 132/16 135/22 136/18 139/20	shown [8] 67/19 68/12 68/13 68/13 68/18 71/8 76/2 148/1	someone's [2] 38/25 58/23
sent [1] 126/22	shows [4] 72/1 76/10 87/24 132/4	something [20] 3/3 37/8 41/17 42/11 49/17 63/21 69/18 70/4 71/22 74/19 75/21 90/21 95/12 95/14 96/9 111/15 125/25 126/9 131/17 134/6
sentence [2] 99/6 100/14	sic [2] 131/21 173/5	sometime [3] 29/15 149/16 187/14
sentences [1] 142/7	side [6] 44/6 63/15 92/8 93/15 98/9 113/24	sometimes [7] 32/1 69/13 72/21 72/22 98/8 108/24 125/5
sentiment [1] 133/4	sides [4] 89/6 114/20 157/19 191/12	somewhat [3] 74/12 120/2 125/5
separate [2] 91/9 91/17	sign [2] 23/11 137/5	somewhere [4] 19/25 20/15 21/10 67/1
separated [7] 39/10 85/23 86/16 90/18 100/17 102/7 102/10	significance [1] 24/8	sophomore [1] 101/5
separation [4] 83/10 85/12 86/1 100/20	significant [28] 32/20 33/2 34/4 71/2 94/24 111/1 111/16 113/25 118/7 122/22 125/3 136/5 139/2 144/16 145/14 148/3 162/25 166/19 174/11 174/12 181/7 181/11 181/15 181/19 181/23 183/4 184/16 184/24	sorry [14] 11/1 18/17 43/3 48/18 48/19 51/22 54/24 60/3 63/11 91/20 145/22 156/19 179/10 190/17
separations [3] 74/5 85/7 101/19	significantly [2] 167/1 172/6	sort [1] 56/17
September [3] 1/7 2/2 192/12	similar [4] 46/22 111/4 155/25 170/20	sorts [1] 16/2
Serbia [1] 90/13	simple [1] 47/16	sounds [1] 142/6
series [3] 112/24 145/8 161/13	simply [2] 129/25 173/19	source [3] 86/14 112/17 113/7
serious [1] 41/17	since [17] 16/3 16/23 50/17 137/14 139/5 140/2 142/11 147/13 151/4 159/1 177/4 177/7 177/14 177/14 177/16 183/5 183/7	sources [4] 112/20 155/2 155/3 158/24
serve [12] 5/9 35/25 71/1 78/1 109/23 117/19 117/21 119/3 119/21 119/21 119/22 164/15	single [3] 52/5 95/20 116/22	South [13] 27/21 27/22 90/6 118/13 124/8 130/16 130/16 130/22 130/22 130/23 130/25 131/22 160/25
served [19] 3/23 15/4 15/22 16/23 26/17 64/17 65/16 89/14 89/16 89/16 90/11 108/14 109/17 109/19 140/23 140/25 142/14 159/16 186/22	sir [98] 3/7 17/5 18/19 18/21 20/6 42/10 53/12 59/20 61/10 62/2 62/6 62/10 63/19 63/24 64/1 64/22 64/24 65/3 65/17 65/22 66/11 66/14 67/3 67/11 68/3 68/7 68/11 68/16 68/20 69/13 69/20 71/10 71/14 71/21 71/24 72/4 72/7 72/10 72/13 72/16 72/25 73/5 73/22 73/25 74/7 74/10 74/14 76/3 76/15 77/2 78/11 79/15 82/8 82/14 82/25 83/3 83/7 83/11 83/18 83/24 84/6 85/5 85/10 85/14 85/17 85/25 86/4 87/10 87/23 88/14 89/14 89/25 90/8 91/7 91/24 92/3 93/9 94/8 95/25 96/18 96/22 97/9 97/12 97/17 98/17 100/7 100/13 100/22 101/1 102/5 102/8 102/11 102/16 102/20 102/24 103/2 103/4 149/24	South America [2] 27/21 90/6
service [56] 4/12 4/17 4/20 4/24 5/1 5/3 5/6 5/7 5/10 19/22 23/6 23/22 38/25 40/21 59/21 60/13 61/23 61/24 78/2 78/3 79/3 81/17 81/19 81/22 89/22 96/2 103/12 103/22 116/7 116/11 116/16 116/21 117/2 117/10 117/17 118/16 119/1 119/1 120/25 122/19 124/21 124/25 126/8 127/9 130/5 130/10 130/12 130/14 130/19 132/23 134/7 134/12 135/23 139/21 144/13 160/18	sit [1] 170/25	South Asia [1] 27/22
servicemen [2] 125/6 125/7	sit-down [1] 170/25	South Carolina [1] 160/25
services [12] 123/7 128/25 131/3 133/5 134/2 134/8 135/3 138/12 146/3 147/18 148/7 165/19	sites [1] 171/15	South Korea [7] 124/8 130/16 130/16 130/22 130/22 130/23 130/25
serving [7] 36/7 89/19 119/19 120/10 125/5 160/2 160/10	sitting [2] 61/8 113/13	South Vietnam [1] 131/22
session [2] 81/6 128/10	situation [4] 38/8 50/17 137/15 189/9	Southeast [2] 27/22 170/10
sessions [1] 36/18	situations [1] 51/15	Southeast Asia [1] 27/22
set [10] 28/19 105/14 121/1 121/24 132/18 136/11 157/21 167/6 169/15 190/2	six [2] 100/19 171/21	Space [1] 147/21
sets [1] 15/3	sizable [1] 98/13	spaces [1] 13/19
seven [2] 27/19 86/3	size [1] 30/12	sparkled [2] 33/3 127/15
seven-year [1] 86/3	skill [1] 15/3	speak [10] 6/5 6/8 6/10 29/19 29/20 30/15 42/20 48/7 50/10 110/6
seventh [1] 109/18	skills [2] 5/21 166/1	speaking [3] 30/21 104/23 157/6
several [7] 24/25 84/6 86/11 89/16 90/5 111/21 173/17	skip [2] 8/25 58/14	speaks [1] 49/12
severe [1] 173/13	skipper [1] 30/15	special [17] 22/20 24/18 25/7 25/9 26/17 26/21 27/6 29/23 32/17 35/3 38/3 46/22 47/6 82/7 94/1 133/22 169/2
severely [2] 88/1 88/2	slavery [1] 121/12	specialized [2] 166/2 187/2
sex [1] 11/14	sleeping [1] 13/19	specific [14] 13/4 43/9 54/19 56/20 68/24 69/7 69/11 69/22 80/4 99/2 127/2 128/18 144/9 163/2
sexism [11] 11/5 11/6 11/9 11/10 11/13 11/18 12/6 12/9 12/22 12/23 13/9	slide [12] 56/12 56/19 56/20 56/22 57/15 57/18 58/5 58/6 58/15 119/6 129/5 131/20	specifically [9] 7/5 34/6 35/10 47/8 55/16 67/5 88/6 96/4 143/16
sexist [2] 11/16 11/16	slides [4] 58/2 158/8 188/19 188/19	specifics [2] 4/9 179/21
sexual [2] 41/4 142/10	slightly [1] 79/18	specify [1] 132/23
sexuality [1] 105/22	slots [2] 117/14 186/10	speculation [1] 49/18
sexually [1] 38/14	slurs [3] 178/19 180/2 181/15	spell [4] 3/11 18/25 61/15 104/24
shadow [1] 120/20	small [6] 86/2 86/15 91/2 124/6 173/11 174/4	spelling [1] 150/2
shake [2] 60/2 60/4	smaller [1] 91/7	spend [2] 95/2 167/14
Shallows [1] 155/13	smartphones [1] 15/23	spends [1] 95/3
sharing [1] 6/16	Smith [1] 39/18	spent [5] 64/20 70/11 89/18 107/6 109/20
shave [1] 13/25	so [252]	sphere [1] 137/20
shaving [1] 13/21	sobering [1] 41/18	
she [10] 39/4 39/7 56/18 84/15 84/16 92/1 104/9 112/6 186/12 186/12		
she's [1] 39/5		
sheet [2] 67/14 67/18		
Sherwood [16] 2/13 17/25 149/20 149/23 150/4 150/8 150/10 156/13 157/2 158/1 158/8 158/12 160/6 177/25 185/7 187/10		



**S**

spill [1] 163/20  
 spilled [1] 130/2  
 split [1] 100/19  
 spoke [2] 41/4 133/7  
 spoken [2] 42/21 42/24  
 spokesperson [1] 133/1  
 sport [4] 70/24 75/8 95/3 96/10  
 sports [13] 4/19 70/23 74/20 76/7 92/13  
 92/23 92/25 94/14 94/16 95/1 96/14 98/23  
 99/3  
 spread [3] 128/25 129/16 177/18  
 spreadsheet [1] 72/1  
 spring [4] 15/5 79/23 79/23 101/6  
 squadron [3] 64/18 64/19 89/17  
 squadrons [3] 70/17 89/16 98/3  
 staff [10] 26/18 65/1 65/4 65/12 89/20  
 110/12 124/3 124/4 177/1 188/20  
 stage [1] 28/19  
 stamp [1] 11/21  
 stamps [1] 13/11  
 stand [13] 17/7 18/8 60/10 80/24 81/9  
 103/19 128/1 149/13 149/15 168/9 187/13  
 189/4 191/19  
 standard [2] 113/9 189/4  
 standardize [1] 134/5  
 standards [6] 4/7 14/4 165/2 165/4  
 165/17 182/25  
 standing [1] 61/10  
 stands [4] 49/22 77/4 88/18 128/4  
 star [2] 23/21 187/4  
 start [9] 41/3 99/19 115/25 127/24 137/7  
 159/12 167/16 174/18 176/21  
 started [9] 14/25 33/16 77/7 127/9 134/3  
 134/3 141/16 150/1 168/4  
 starting [6] 3/3 57/10 164/20 166/6  
 174/22 175/14  
 state [8] 18/25 19/10 34/3 35/15 55/19  
 61/15 104/24 150/9  
 stated [1] 124/21  
 statement [9] 9/10 10/25 13/2 62/15  
 65/14 67/20 67/22 73/8 85/20  
 statements [3] 37/16 37/19 37/25  
 states [25] 1/1 1/6 9/3 16/18 26/9 63/19  
 97/14 112/21 118/12 121/11 121/14 124/6  
 129/17 130/11 130/18 136/20 137/2 139/6  
 142/9 145/1 148/7 148/19 179/4 192/5  
 192/11  
 stateside [1] 24/21  
 stating [2] 3/10 150/2  
 station [3] 130/6 165/10 167/8  
 stationed [1] 25/12  
 statistic [1] 72/23  
 stay [4] 38/25 77/19 77/25 78/22  
 steep [1] 70/4  
 stenographically [1] 192/8  
 stenographically-reported [1] 192/8  
 stenotype [1] 1/24  
 step [5] 17/5 59/19 116/10 135/9 187/11  
 Stepping [1] 48/5  
 steps [4] 145/11 145/14 145/16 146/22  
 stereotypes [1] 29/12  
 Steve [3] 17/24 60/14 60/20  
 Steven [2] 2/8 61/16  
 steward [1] 120/10  
 stick [1] 10/25  
 sticks [1] 127/10  
 stigmatized [1] 161/5  
 still [30] 10/19 12/6 39/4 39/9 50/13  
 51/5 51/16 51/20 59/20 60/24 66/16 75/4  
 77/18 79/5 80/7 81/21 82/2 82/6 84/18  
 120/6 120/9 120/21 138/10 154/14 163/14  
 173/18 178/23 185/8 188/25 190/4  
 stockade [4] 129/5 129/7 129/7 129/8  
 stocked [1] 122/18  
 stop [4] 80/22 99/16 127/22 127/23  
 stopped [2] 49/4 145/6  
 stops [4] 149/2 184/11 184/17 184/25  
 story [2] 154/6 182/6  
 strategic [2] 28/16 34/11  
 strategy [3] 65/19 66/4 66/21  
 STRAWBRIDGE [4] 1/13 68/8 187/16 188/3  
 streets [1] 130/2  
 strength [1] 44/19  
 strides [1] 159/16  
 strike [4] 46/11 161/23 170/24 170/25  
 strong [4] 83/7 95/22 132/16 177/18  
 struggling [2] 101/16 138/10  
 STUDENT [1] 1/21  
 students [11] 1/3 45/22 46/15 70/21

77/21 92/12 103/11 138/15 141/12 173/15  
 176/4  
 studied [2] 138/18 154/11  
 studies [9] 26/14 105/9 108/16 108/20  
 155/7 156/5 184/3 184/5 185/7  
 study [8] 83/19 102/15 108/13 142/19  
 152/15 183/11 183/16 183/24  
 studying [2] 140/20 142/16  
 stuff [1] 70/20  
 Stuttgart [1] 130/6  
 sub [1] 49/11  
 sub-factor [1] 49/11  
 subcommittee [8] 108/18 109/4 109/6  
 109/9 109/10 109/17 109/19 109/22  
 subcomponent [1] 45/5  
 Subic [5] 163/17 167/24 167/25 171/22  
 172/9  
 Subic Bay [1] 167/25  
 subject [5] 30/19 37/2 38/8 83/10 106/10  
 subjected [1] 178/18  
 submarine [4] 82/5 82/6 88/20 88/22  
 submarines [4] 70/17 82/9 82/10 98/3  
 submit [4] 132/1 190/23 190/24 190/25  
 submitted [2] 67/16 189/25  
 subordinated [1] 119/20  
 subordination [2] 116/6 117/24  
 subs [1] 82/9  
 subset [7] 44/17 44/20 44/24 56/10 59/4  
 92/19 92/22  
 substantial [3] 93/7 94/3 97/6  
 succeed [1] 138/22  
 success [5] 28/9 28/10 28/12 44/20 182/6  
 successful [1] 168/13  
 successor [1] 174/23  
 such [9] 8/18 9/4 80/16 99/17 121/1  
 137/12 160/4 178/18 180/7  
 sudden [1] 165/1  
 suffer [2] 82/17 82/22  
 suffered [1] 162/24  
 suggest [2] 136/22 136/23  
 suggesting [1] 62/23  
 suggestion [1] 132/12  
 suggestions [1] 102/25  
 suggests [1] 125/12  
 summary [3] 84/2 114/14 158/8  
 summed [1] 121/25  
 summer [8] 47/1 70/16 80/9 98/1 118/10  
 160/23 179/1 179/3  
 summers [1] 176/6  
 Sundays [1] 61/7  
 superintendent [7] 57/19 57/21 65/1 65/5  
 66/2 66/10 89/21  
 superintendent's [1] 65/23  
 superintendents [1] 65/16  
 superior [1] 47/12  
 supermarket [1] 162/12  
 supply [1] 34/9  
 supplying [1] 15/2  
 support [4] 27/3 37/14 157/3 173/19  
 supported [2] 10/24 121/7  
 suppose [1] 75/15  
 supposed [1] 69/6  
 suppress [1] 169/6  
 suppression [1] 171/14  
 Supreme [1] 130/9  
 supremely [1] 171/23  
 sure [30] 10/9 19/16 21/17 23/19 24/9  
 29/4 37/7 43/11 51/11 52/1 54/1 57/17  
 62/11 66/17 73/13 77/11 83/20 85/17  
 88/17 114/21 114/22 184/21 187/23 188/18  
 188/20 189/1 189/8 189/16 189/21 191/14  
 surely [1] 187/11  
 surf [2] 16/9 16/10  
 surface [1] 171/15  
 surfing [1] 16/14  
 surprise [1] 16/16  
 surprised [2] 16/20 123/24  
 surrounded [1] 127/12  
 survey [1] 75/17  
 sustained [3] 54/18 54/23 55/6  
 swiftly [1] 30/25  
 swim [1] 90/25  
 swing [1] 19/14  
 switch [1] 99/13  
 switching [1] 99/16  
 sword [1] 163/23  
 sworn [10] 3/8 10/13 18/20 18/24 61/10  
 61/13 104/20 104/21 149/23 149/25  
 symbolic [2] 140/25 140/25  
 symposia [1] 108/23

**system** [14] 8/8 10/1 10/5 10/7 10/23  
 12/10 20/4 144/25 166/21 168/8 171/15  
 172/1 172/2  
**systemic** [1] 13/9

**T**

tab [2] 67/9 113/14  
 Tab 1 [1] 113/14  
 table [2] 104/8 104/10  
 tactic [2] 122/10 122/23  
 tactical [1] 28/11  
 tactics [1] 122/10  
 Taiwan [1] 165/12  
 take [34] 9/10 17/20 31/18 31/21 31/23  
 34/10 41/1 41/2 55/10 60/10 75/3 80/9  
 80/23 81/1 81/9 86/8 104/10 106/12  
 106/15 106/17 107/8 122/19 127/23 134/5  
 137/21 143/9 152/7 152/9 152/11 165/5  
 170/6 186/14 186/17 188/14  
 takeaway [4] 30/20 32/25 36/12 36/17  
 taken [7] 18/10 41/16 81/4 128/8 146/23  
 159/18 169/18  
 takes [3] 74/23 186/15 186/18  
 taking [7] 47/16 74/21 94/24 116/10  
 135/9 169/23 170/7  
 talk [12] 41/18 42/11 51/19 66/20 80/21  
 81/13 96/13 105/23 136/24 149/14 151/5  
 168/15  
 talked [10] 45/9 51/17 51/21 64/23 85/21  
 127/1 128/18 129/22 180/22 190/13  
 talking [11] 37/22 58/21 58/25 124/13  
 128/19 131/4 148/16 148/17 148/18 179/10  
 190/10  
 talks [2] 151/1 155/9  
 targeted [1] 182/14  
 targets [1] 169/20  
 task [6] 8/14 8/18 9/4 32/16 32/17 32/19  
 taught [6] 106/22 106/23 107/1 107/11  
 107/15 107/17  
 taxing [1] 96/6  
 teach [1] 134/17  
 teaching [3] 97/23 105/20 108/25  
 team [44] 24/3 24/4 24/8 24/12 24/13  
 24/16 24/17 24/18 24/22 24/23 25/5 25/16  
 25/19 25/23 26/1 26/2 26/24 26/25 27/4  
 28/23 31/14 31/16 31/22 32/6 32/7 32/10  
 32/15 32/18 32/24 34/6 34/7 34/21 35/7  
 35/13 35/14 39/2 51/6 51/14 51/16 51/20  
 95/16 96/10 96/11 104/8  
 Team 10 [1] 32/15  
 teammates [1] 31/17  
 teams [8] 24/9 24/10 24/10 28/3 50/14  
 53/18 53/19 182/20  
 teamwork [3] 22/23 95/15 96/11  
 teething [1] 180/25  
 television [1] 130/13  
 tell [9] 3/23 29/6 76/11 80/3 84/9 86/8  
 142/6 168/8 168/11  
 Temple [2] 107/6 108/13  
 ten [1] 127/23  
 tend [6] 86/21 93/20 95/21 96/16 142/17  
 159/16  
 tended [4] 99/15 125/5 136/20 159/16  
 tension [9] 9/22 9/25 10/4 10/9 10/19  
 126/17 158/15 160/19 162/7  
 tensions [7] 10/22 126/13 126/14 141/2  
 144/16 145/11 178/24  
 tenured [1] 107/2  
 term [4] 66/4 74/3 75/5 121/13  
 terms [31] 11/18 20/3 20/9 20/15 21/20  
 22/4 22/14 28/10 32/20 35/11 44/6 44/25  
 46/1 50/24 77/16 94/20 104/13 107/25  
 113/25 116/19 117/2 118/25 135/5 185/7  
 185/17 186/13 187/22 188/16 188/18  
 188/21 190/17  
 Terrific [1] 190/20  
 terrorist [1] 28/14  
 Terry [1] 133/6  
 test [5] 4/13 20/1 20/13 164/17 165/5  
 testified [12] 4/16 4/22 5/5 46/1 52/1  
 53/3 54/12 55/2 56/7 143/12 183/7 184/8  
 testimony [17] 17/6 56/13 58/13 59/9  
 59/23 103/17 111/5 114/7 124/13 127/25  
 147/24 149/14 155/24 158/2 182/1 187/12  
 188/6  
 tests [2] 90/25 173/12  
 Texas [1] 175/15  
 text [3] 16/3 16/4 87/25  
 texting [2] 15/25 16/4  
 Thailand [1] 124/9

than [15]	4/13 12/13 18/3 6/20/11 76/12 80/5 82/23 85/22 95/9 147/10 166/24 174/15 188/7 189/16	168/1 169/15 170/21 171/10 171/20 173/8 173/10 174/3 174/21 174/23 175/12 175/23 176/14 177/15 177/17 177/18 178/17 188/13 189/18	time [77]	15/15 17/20 21/21 22/5 22/15 24/16 25/10 26/19 27/4 28/23 31/19 32/8 32/10 32/14 33/14 35/2 38/7 42/3 48/18 50/5 50/11 52/19 52/24 55/23 64/11 70/7 70/12 70/12 70/13 70/19 71/11 71/14 75/8 76/21 81/18 84/11 95/3 98/7 99/6 99/11 99/17 99/21 111/24 116/5 121/5 121/14 123/13 125/4 125/11 127/22 128/20 131/19 133/7 135/1 135/10 136/8 140/4 146/2 149/12 153/13 153/20 156/1 156/12 157/15 162/17 167/14 167/23 170/8 179/6 180/15 185/18 186/20 188/14 188/15 189/22	
thank [80]	3/9 3/11 4/3 12/2 17/1 17/4 17/8 19/3 19/5 19/16 20/8 30/5 40/8 40/9 40/20 40/22 46/13 53/21 54/8 56/4 59/16 59/20 59/21 60/12 61/11 61/18 62/7 66/19 71/4 75/11 77/6 80/20 81/10 84/24 89/3 103/6 103/12 103/15 103/16 103/20 103/21 103/21 103/22 104/4 104/6 104/19 105/1 107/10 109/2 110/16 112/8 114/4 114/24 122/24 124/18 126/11 128/14 128/17 141/5 141/20 146/5 149/8 149/11 149/12 149/17 149/18 149/24 150/5 156/25 157/24 177/20 177/21 185/3 187/5 187/10 187/14 187/15 191/3 191/9 191/19	there's [29]	42/16 47/9 47/13 56/13 57/2 60/5 64/6 69/14 69/18 69/19 70/1 74/4 80/13 83/7 83/17 84/4 87/12 89/15 93/14 104/15 104/16 133/9 137/25 140/1 157/19 166/12 168/24 189/11 189/18	timeline [1]	186/3
Thanks [2]	132/8 143/11	thereafter [2]	79/4 129/19	times [14]	27/18 27/19 37/2 71/8 83/9 85/15 85/22 90/1 90/5 90/9 101/16 121/11 127/11 130/13
that [805]		therefore [3]	51/12 52/5 162/5	Timika [2]	84/11 84/11
That'll [1]	190/8	therein [1]	157/20	timing [1]	188/18
that's [101]	4/4 6/2 6/9 7/20 8/15 9/24 11/17 12/12 13/14 14/12 15/6 16/5 17/16 17/20 18/2 18/6 22/1 22/11 37/10 38/22 41/8 41/10 41/17 42/11 43/21 43/24 44/13 52/24 54/18 55/19 55/22 56/3 56/5 58/12 58/25 59/10 60/7 60/8 60/11 60/20 60/25 62/22 62/22 67/6 71/15 72/7 72/25 79/21 80/1 80/7 80/18 82/20 83/11 83/12 84/8 85/15 86/3 93/16 95/11 96/7 96/9 96/25 98/1 99/15 100/7 101/9 101/12 103/25 104/2 104/10 104/11 109/5 113/17 114/12 117/22 122/1 126/1 126/2 136/4 136/14 143/21 145/12 147/1 147/8 170/7 174/11 186/11 187/17 187/17 187/19 187/21 188/10 188/11 188/13 189/14 190/7 190/15 190/15 190/20 191/2 191/12	these [45]	13/7 18/9 23/19 36/17 36/18 37/16 42/24 47/2 53/14 55/11 58/7 58/22 73/1 77/10 85/17 101/15 110/25 114/19 118/20 121/18 121/22 122/6 129/6 139/5 143/5 156/9 161/1 161/1 162/7 162/20 166/11 168/8 168/11 168/16 172/10 172/13 172/16 173/14 176/3 176/3 180/11 180/19 181/1 182/10 191/10	title [4]	102/19 105/6 142/4 150/13
their [76]	9/17 13/21 13/25 22/23 32/25 36/20 42/20 43/16 43/17 44/19 45/4 48/7 61/25 70/8 70/12 70/22 75/7 75/8 76/20 76/21 85/20 86/24 89/1 93/21 94/1 94/20 94/25 95/2 96/4 97/23 98/13 98/14 99/1 101/5 101/6 101/6 101/9 117/17 119/3 119/11 119/19 122/16 122/17 125/9 126/7 130/12 130/15 130/23 132/6 132/25 133/18 133/24 134/16 136/15 137/20 147/18 147/19 147/21 147/22 148/8 148/11 160/10 161/7 161/8 166/3 168/5 168/11 168/18 169/2 170/17 175/20 176/5 176/7 185/22 186/11 189/20	they [229]		titled [2]	84/2 142/23
them [62]	3/11 11/14 11/14 27/15 32/3 36/11 36/18 36/18 36/19 36/19 37/20 42/21 42/24 48/17 48/22 50/3 60/9 67/1 68/14 68/17 75/4 75/5 75/17 75/17 75/19 75/19 79/9 81/25 82/1 84/6 84/7 90/19 90/25 92/21 94/1 98/4 98/9 98/24 99/3 101/8 114/22 118/18 118/24 119/12 130/12 132/2 134/8 144/1 165/24 167/19 168/11 168/16 170/17 170/17 171/23 173/14 173/17 175/18 178/20 185/23 185/24 190/23	they'd [1]	92/22	today [17]	3/19 52/6 52/9 53/4 111/5 114/7 114/15 115/16 133/11 143/12 157/13 158/2 158/9 182/1 187/17 189/25 191/15
themselves [2]	73/2 95/16	they'll [1]	78/1	today's [6]	115/17 115/19 133/4 159/3 159/5 159/7
then [48]	5/24 6/16 12/8 14/25 17/24 24/15 29/21 48/11 49/22 54/20 57/2 61/3 66/5 68/23 69/16 72/3 73/23 80/12 81/17 81/19 85/20 87/15 88/8 89/18 89/20 90/24 94/25 95/6 95/18 107/2 107/8 108/15 109/8 129/18 129/20 130/13 131/24 136/5 155/6 161/14 164/7 175/20 176/7 178/21 189/13 190/1 190/3 190/21	they're [24]	17/25 18/4 31/24 39/2 48/21 48/21 70/19 75/9 76/15 77/18 90/18 92/23 93/4 93/23 95/4 95/6 95/18 96/3 98/6 98/24 99/1 99/2 114/23 188/25	together [7]	13/17 51/25 61/7 114/22 132/17 134/7 190/13
there [157]	9/3 10/18 10/22 11/20 12/2 12/5 12/17 13/10 14/4 15/14 15/22 16/1 16/10 25/11 28/24 29/4 29/15 31/1 31/2 32/11 33/5 33/22 34/23 35/17 37/22 45/16 45/17 47/5 47/10 67/9 67/13 69/21 72/17 74/12 74/16 74/25 76/16 77/20 79/1 79/4 79/4 79/5 79/21 80/9 87/4 95/8 96/3 99/5 99/6 101/13 101/20 105/16 106/2 106/8 107/1 107/7 113/20 113/22 116/24 117/14 117/15 117/23 118/7 118/10 118/15 120/2 120/9 123/16 123/18 126/16 126/19 128/20 128/22 129/15 129/23 130/1 130/4 131/11 132/16 133/15 134/10 134/11 134/25 135/9 137/12 137/22 139/2 139/5 141/10 143/13 143/16 143/22 144/4 144/7 144/19 144/20 144/22 144/25 145/3 153/10 159/21 160/14 160/23 160/25 161/12 161/15 161/21 161/23 162/17 163/2 163/4 163/4 163/6 163/7 163/12 163/14 163/19 164/9 164/14 164/20 165/8 166/5 166/7 166/11 166/23	thing [13]	43/9 45/25 52/6 87/11 96/7 120/8 160/5 169/22 173/23 180/20 184/22 188/16 191/17	Togo [1]	136/6
		things [30]	15/2 16/2 29/13 30/9 30/12 30/13 41/15 43/18 44/18 47/23 50/19 53/3 53/14 59/3 59/4 62/20 65/9 65/25 71/2 71/24 90/25 93/22 95/21 96/7 122/3 122/14 126/8 138/13 169/11 182/19	token [1]	189/15
		think [48]	10/19 10/23 11/5 11/9 12/6 28/10 28/16 34/3 41/11 41/15 42/25 43/4 43/7 45/19 47/20 49/12 56/2 60/22 65/14 68/12 70/4 71/2 74/1 74/16 75/2 75/4 76/22 77/3 82/15 84/18 85/19 86/23 91/3 93/14 93/24 96/12 98/7 99/20 101/4 104/11 117/6 126/15 136/9 142/17 185/20 186/12 188/4 188/5	told [8]	33/13 37/13 70/4 74/16 74/19 86/5 88/18 164/4
		thinking [2]	45/12 135/20	tolerate [1]	11/21
		thinks [1]	98/8	tolerated [1]	116/15
		third [6]	115/12 139/15 158/22 158/23 163/4 172/19	toleration [1]	130/14
		thirds [2]	76/5 162/1	too [1]	188/11
		this [194]		took [13]	37/9 107/2 129/4 131/10 139/7 139/25 142/21 145/10 145/14 148/24 168/3 168/19 175/16
		THOMAS [5]	1/15 1/25 55/10 192/4 192/16	tool [3]	148/12 165/21 165/22
		those [86]	6/15 9/18 10/7 16/2 16/21 23/17 29/11 30/20 31/19 32/8 32/8 33/5 34/11 36/15 37/19 37/25 38/19 40/22 44/3 44/21 44/21 47/18 50/19 51/14 51/15 59/4 59/20 62/16 65/12 69/24 70/11 70/21 71/2 73/25 74/21 75/5 76/8 76/10 77/17 78/7 78/17 86/15 88/2 88/10 90/10 91/7 92/19 92/24 93/22 95/21 95/22 95/23 95/23 96/1 96/6 96/16 105/16 111/4 113/23 119/5 119/16 125/17 125/18 125/25 135/6 138/8 143/8 145/16 147/6 147/7 156/24 157/20 159/17 161/16 161/25 164/17 165/23 167/5 167/5 167/10 167/13 171/16 171/21 177/13 177/18 188/22	tools [1]	148/8
		though [2]	118/9 136/7	top [16]	21/22 22/16 23/10 45/20 46/2 46/2 46/5 46/8 68/20 68/22 85/16 88/7 95/1 111/3 111/12 173/15
		thought [5]	46/1 55/7 74/19 100/1 136/5	topic [3]	131/15 142/3 143/9
		thousand [1]	130/19	topics [2]	108/23 110/2
		thousands [2]	124/5 170/25	tore [1]	31/16
		threaten [2]	172/14 172/17	total [4]	101/24 102/3 102/7 109/18
		threatened [3]	148/6 158/20 163/20	totally [1]	188/25
		threatening [1]	123/9	touch [2]	73/9 89/11
		three [13]	8/20 62/21 69/15 69/17 76/4 127/11 130/13 153/21 161/2 170/6 172/1 182/1 182/7	touched [1]	93/15
		three weeks [1]	62/21	tough [1]	98/7
		threshold [1]	69/12	tour [4]	29/15 37/5 37/13 38/10
		threw [1]	3/4	toward [1]	11/16
		through [29]	5/18 10/16 11/24 31/5 38/19 93/24 97/14 98/24 106/19 107/25 108/7 110/4 110/15 112/25 122/23 123/20 124/18 126/9 142/9 145/1 154/8 154/13 154/21 168/4 170/16 173/18 175/21 178/7 178/15	towards [7]	11/17 32/15 36/24 37/12 100/9 161/12 162/25
		throughout [3]	124/7 160/24 163/8	towns [1]	130/2
		Thursday [3]	188/2 188/8 190/4	Townsend [1]	168/7
		Ticonderoga [3]	165/10 166/8 167/9	toxic [1]	172/7
		tied [3]	3/3 132/17 148/11	TRACEY [1]	1/22
				track [4]	41/25 42/2 69/1 107/2
				tracks [1]	65/10
				traditional [3]	89/15 148/21 180/21
				traditionally [1]	147/17
				TRADOC [1]	110/13
				train [5]	65/10 134/8 144/8 147/18 147/21
				trained [3]	24/25 119/9 134/15
				trainee [1]	37/9
				training [26]	25/19 25/24 33/20 35/9 37/7 47/1 56/12 56/14 56/17 56/18 57/12 58/3 58/8 58/10 58/13 59/5 64/17 98/1 110/14 133/25 139/2 153/5 175/13 175/19 176/3 176/5
				transcript [6]	10/16 11/24 124/10 124/17 192/8 192/9
				transcription [1]	1/24
				transcripts [1]	89/1
				transfer [4]	76/24 99/7 99/9 99/17
				transport [3]	14/23 14/25 15/2
				travel [2]	26/8 75/9
				traveling [1]	34/6
				Travis [1]	129/10
				treat [1]	130/22
				treated [1]	178/3
				treating [2]	11/14 179/18
				treatment [3]	125/9 136/3 136/13
				trend [1]	186/2
				trends [4]	69/17 69/18 69/20 185/17
				Trenton [2]	165/9 167/8

155/2 186/21  
various [10] 18/10 23/16 24/13 64/19  
65/11 100/44 105/25 154/23 168/5  
4 Page 215 of 217  
varsity [25] 4/19 42/3 70/24 74/20 74/24  
75/5 76/4 76/6 76/7 76/13 92/9 92/11  
92/12 92/13 92/14 92/25 94/13 98/13  
98/22 99/2 99/8 99/10 99/11 101/12 102/3  
vehicle [2] 176/14 176/14  
venture [2] 49/8 49/21  
verge [1] 169/9  
version [2] 190/23 190/25  
versions [2] 68/12 68/13  
versus [1] 59/3  
very [59] 16/10 17/4 17/8 29/12 30/13  
31/15 31/15 33/5 33/12 34/7 42/9 48/25  
53/4 54/5 54/24 61/11 61/18 74/10 75/2  
75/8 80/14 86/15 91/2 95/22 96/6 96/14  
101/5 103/16 103/21 103/21 104/19 114/22  
116/19 121/6 129/19 131/17 134/4 134/21  
142/6 149/11 149/17 161/6 162/4 163/12  
171/24 173/6 173/10 174/3 174/8 178/21  
186/7 187/5 187/10 187/14 188/19 189/24  
191/9 191/17 191/20  
vessels [2] 131/10 154/14  
veteran [1] 61/1  
via [1] 16/2  
vice [4] 26/3 33/15 33/16 33/18  
victim [1] 39/3  
victims [3] 162/2 162/3 173/24  
Victor [1] 61/17  
Vietnam [54] 115/10 123/2 123/7 124/7  
124/22 126/13 126/22 127/3 127/6 127/11  
128/19 128/24 129/25 131/22 131/23  
132/10 137/2 138/24 142/24 145/12 145/22  
146/11 147/15 148/17 153/21 153/22  
153/24 158/20 162/23 162/24 163/3 163/5  
164/8 164/15 164/18 165/18 167/15 169/1  
169/19 169/21 171/9 172/10 172/13 172/16  
178/23 179/10 179/13 179/18 179/22 181/2  
181/17 181/21 181/24 183/7  
Vietnamese [1] 170/3  
view [12] 3/24 9/22 9/25 10/4 33/10 59/6  
175/14 186/13 188/3 188/9 191/4 191/6  
views [7] 6/13 6/13 6/15 42/23 42/25  
43/5 43/10  
vignette [1] 136/1  
violations [2] 90/23 100/19  
violence [49] 115/9 118/1 118/3 118/4  
118/9 118/11 119/4 123/1 123/5 123/9  
123/17 123/19 123/21 123/24 124/2 124/21  
124/22 125/17 126/19 126/23 127/3 127/5  
127/16 128/19 128/22 129/2 129/11 129/15  
129/19 129/21 129/23 129/24 130/1 130/5  
131/6 131/10 131/16 131/18 131/21 132/1  
132/6 132/9 132/17 135/21 136/16 137/9  
141/2 145/14 148/6  
violent [6] 139/6 144/13 146/16 146/19  
146/21 146/25  
Virginia [1] 118/16  
visible [9] 36/18 118/4 135/7 135/15  
135/21 139/19 148/2 148/9 171/22  
visit [4] 34/3 34/14 34/17 70/15  
visiting [2] 106/22 107/1  
visits [1] 34/2  
visually [1] 34/21  
vital [2] 162/20 171/14  
voice [3] 19/16 42/8 42/10  
voir [3] 112/2 112/4 156/19  
volume [1] 188/23  
voluntarily [1] 97/7  
voluntary [20] 73/24 74/5 74/10 75/13  
78/7 79/11 79/12 86/18 90/18 91/14 91/17  
91/23 91/25 93/13 97/16 97/19 98/9 99/10  
99/22 100/18  
volunteer [5] 137/3 137/3 137/4 139/9  
143/3  
volunteered [1] 126/21  
vs [1] 1/5

W	
W-O-O-D [1]	3/12
waiting [1]	61/6
wake [1]	129/13
Wakefield [1]	84/17
waking [1]	95/2
walk [3]	92/23 106/19 173/20
Walker [2]	3/25 3/25
Wallace [1]	133/6
Wallace Terry [1]	133/6
want [54]	3/18 3/19 4/12 8/25 10/15 28/7

Case 1:23-cv-02699-RDB Document 143 Filed 10/01/24 Page 216 of 217

want... [48] 38/23 38/18 33/24 30/23 33/18 42/11 48/17 48/22 53/22 55/9 53/11 53/18 56/12 58/21 62/11 66/20 68/4 71/15 73/6 75/21 81/13 83/19 84/25 87/11 89/11 90/15 95/12 96/2 96/19 97/3 98/10 102/17 141/16 160/17 161/7 161/24 162/21 167/14 167/16 170/18 172/19 184/21 186/15 186/16 188/14 188/16 188/20 189/21

wanted [4] 22/24 38/4 93/15 148/8

wants [3] 4/15 93/20 93/20

war [90] 24/1 104/9 105/8 108/16 108/20 110/11 110/11 116/4 116/4 116/5 116/10 116/10 116/20 116/22 116/24 117/7 117/25 117/25 118/4 118/9 118/22 118/22 120/9 120/19 120/20 123/7 124/4 124/22 126/13 128/19 128/23 137/2 142/21 143/17 143/23 144/5 147/15 148/17 152/6 153/14 153/21 153/23 153/24 154/8 154/9 155/13 158/15 158/20 159/14 159/15 159/16 159/22 159/25 160/13 160/15 160/20 161/9 161/11 161/12 162/8 162/23 162/24 163/3 164/5 164/8 164/18 165/15 167/15 169/1 169/19 171/10 172/11 172/14 172/17 178/8 178/8 178/14 178/16 178/17 178/23 179/11 179/14 179/18 179/22 181/2 181/17 181/21 181/24 183/7 185/13

War II [5] 117/7 117/25 153/14 159/14 185/13

war-fighting [1] 24/1

warfare [11] 22/20 24/18 26/17 26/21 34/8 36/22 38/3 46/22 46/22 47/6 82/7

wars [2] 154/7 159/18

wartime [1] 159/17

was [353]

Washington [5] 151/15 151/20 151/24 152/18 160/25

wasn't [6] 30/23 31/4 58/10 129/15 189/6 189/10

Wasp [1] 15/8

watch [2] 54/8 118/17

water [2] 35/12 153/22

way [14] 11/14 13/3 29/22 30/16 51/14 54/22 73/1 114/19 121/3 122/4 128/3 129/15 154/8 191/16

ways [8] 16/1 33/20 46/11 95/8 137/24 138/5 140/2 177/9

we [130] 3/5 7/21 9/5 9/14 9/19 9/20 10/10 11/3 11/23 12/2 12/9 15/17 16/1 17/19 18/3 20/7 23/13 24/25 27/13 27/15 28/16 29/4 29/7 29/7 29/7 31/9 31/16 31/17 31/18 31/19 32/7 33/12 34/1 34/10 34/19 34/20 34/20 34/22 35/8 38/13 40/17 46/25 49/10 53/4 54/6 57/17 60/6 61/6 61/8 62/12 62/17 63/20 64/23 67/18 68/25 69/1 69/5 69/6 69/13 69/17 69/20 71/23 72/5 74/10 74/17 74/25 75/2 75/4 75/5 75/13 75/16 80/4 80/11 80/18 81/17 81/17 81/19 83/19 83/20 84/19 85/21 88/22 90/24 91/3 92/22 92/25 93/24 93/25 94/11 95/12 95/12 95/14 96/2 96/13 97/21 98/4 99/6 99/20 101/17 103/12 108/22 108/25 110/2 110/3 114/22 117/6 128/18 129/22 141/16 149/17 150/1 150/19 164/12 170/5 177/25 180/12 181/1 188/7 189/1 189/2 189/8 189/16 189/21 189/22 190/1 190/3 190/9 190/13 190/23 191/19

we'd [3] 13/3 156/12 157/15

we'll [17] 18/7 58/13 60/23 69/19 71/16 75/3 80/12 80/23 81/1 114/10 114/21 115/25 127/22 127/23 127/24 141/20 190/20

we're [28] 11/19 18/2 18/5 40/23 42/17 57/12 57/25 61/6 63/7 63/14 63/14 68/17 73/1 78/20 96/9 96/12 97/1 104/7 140/2 148/16 148/17 148/18 184/21 187/20 188/1 188/5 189/1 189/14

we've [9] 18/9 40/17 40/18 44/2 58/12 92/7 141/14 189/24 189/25

weapon [1] 148/14

weapons [4] 168/3 168/11 169/3 169/3

wear [1] 23/15

wearing [2] 23/10 23/16

web [3] 16/9 16/10 16/14

website [1] 156/3

Wednesday [3] 188/7 190/2 190/6

week [13] 17/8 59/25 61/1 103/18 127/13 149/16 187/13 187/14 187/23 189/5 189/7 191/10 191/19

weeks [6] 15/18 58/8 58/10 58/13 62/21 129/8

well-known [1] 19/40/7 61/8/10/18/19 63/13 128/16 138/19

well [82] 10/7 13/23 16/10 21/19 22/13 23/23 26/7 26/10 26/20 27/1 27/22 28/10 28/21 29/19 31/4 32/4 32/25 33/9 33/21 34/17 38/5 43/9 47/2 47/3 48/10 52/9 53/9 54/20 63/2 64/19 67/4 75/14 76/17 87/3 94/22 99/8 100/3 101/7 104/11 104/17 107/24 108/13 109/1 110/11 112/18 113/24 114/20 114/23 122/7 125/25 129/16 131/20 132/4 133/23 135/19 138/5 139/18 144/5 145/4 146/2 154/5 159/15 164/7 165/15 168/12 174/14 175/3 176/7 178/7 179/21 182/8 186/5 186/15 188/1 188/10 189/20 189/21 190/8 191/2 191/13 191/14 191/18

well-documented [1] 132/4

went [13] 5/24 11/25 19/13 21/1 26/12 31/5 31/8 104/9 130/13 141/23 151/14 153/2 167/24

were [232]

weren't [5] 16/13 65/14 73/8 148/10 164/9

Wes [1] 174/3

Wesley [1] 172/24

West [12] 24/11 25/2 124/8 126/20 127/1 130/1 130/2 130/11 136/6 145/16 145/25 162/13

West Coast [2] 25/2 162/13

West Coat [1] 24/11

West German [1] 130/2

West Germany [5] 124/8 126/20 127/1 130/1 130/11

West Point [2] 145/16 145/25

Western [1] 90/4

Westmoreland's [1] 124/3

what [214]

what's [8] 65/4 68/18 76/2 85/2 124/24 126/18 139/17 166/12

whatever [2] 4/15 175/18

whatnot [1] 95/7

whatsoever [2] 51/2



**W**  
world... [87] 116/4 116/4 116/4 116/4 116/4  
116/20 116/24 117/7 117/25 117/25 118/4  
118/9 118/22 118/22 121/15 124/7 130/3  
143/17 143/23 153/14 154/9 158/15 159/14  
159/15 159/22 159/25 160/13 160/15  
160/20 161/9 161/11 162/8 178/8 178/8  
178/14 178/16 178/17 185/13  
**World War II** [1] 154/9  
**worldwide** [1] 124/9  
**worried** [1] 123/8  
**worst** [1] 160/2  
**worth** [1] 70/1  
**would** [95] 4/1 4/12 4/19 5/1 5/9 7/18  
8/5 8/6 8/8 11/15 15/12 16/15 16/16  
22/16 23/20 27/9 29/8 30/16 37/23 41/15  
41/16 42/16 43/21 45/2 45/24 45/24 48/16  
48/21 49/6 49/9 49/10 49/10 49/15 49/19  
50/7 50/13 51/5 51/13 51/16 51/20 52/15  
53/13 56/9 63/3 66/17 69/24 70/1 70/3  
71/11 71/22 76/11 77/22 80/16 89/15  
91/13 93/11 94/17 97/25 98/20 99/14  
103/12 112/13 114/17 123/23 127/20  
127/20 134/14 136/6 138/19 144/1 147/4  
147/8 147/12 148/10 149/1 149/3 155/23  
158/11 158/17 161/8 164/13 164/15 169/5  
169/11 169/12 169/13 169/14 169/16  
169/25 171/17 173/21 175/20 190/16  
190/22 191/2  
**wouldn't** [6] 30/24 49/8 49/17 49/21  
53/17 82/19  
**wounded** [4] 117/11 117/21 119/12 127/11  
**woven** [1] 157/20  
**wrap** [1] 188/6  
**wrapped** [2] 78/11 78/12  
**write** [8] 37/19 41/22 100/10 100/14  
110/3 150/23 155/25 189/3  
**writing** [3] 111/17 112/16 152/16  
**writings** [1] 183/20  
**written** [5] 37/16 110/22 153/21 153/22  
153/23  
**wrong** [3] 76/11 87/4 90/21  
**wrote** [5] 37/20 41/24 119/2 142/23 156/3  
**WYRICK** [10] 1/14 2/12 104/8 104/17 112/2  
141/6 141/9 141/12 149/8 156/19

**X**  
**xo** [2] 25/22 34/1

**Y**  
**YANG** [1] 1/17  
**yeah** [14] 10/4 14/9 16/10 25/22 52/14  
76/23 83/3 83/3 85/19 95/7 147/10 176/13  
190/15 191/3  
**year** [56] 8/9 20/23 21/5 29/14 56/21  
56/21 57/10 57/10 57/11 57/11 57/13  
57/15 57/15 57/22 69/19 70/6 70/8 70/9  
72/2 72/5 73/21 73/22 74/11 76/3 76/10  
77/11 77/14 77/17 77/19 77/21 77/22  
78/19 78/22 79/3 82/20 86/3 86/3 97/2  
99/15 100/12 101/21 105/12 106/21 106/25  
108/14 108/23 109/18 109/20 129/18 157/4  
163/8 164/24 166/10 174/5 174/5 174/15  
**years** [57] 8/10 12/25 13/8 14/13 15/10  
15/12 24/5 24/25 36/5 36/6 57/9 64/20  
64/25 65/12 65/24 70/10 70/11 70/22  
71/18 73/16 77/25 78/8 78/15 78/23 79/12  
79/13 80/1 83/5 85/1 85/3 86/11 89/14  
89/18 89/19 89/20 95/17 98/14 101/5  
107/1 107/6 108/7 109/20 115/6 137/21  
137/24 142/17 147/8 147/9 147/10 148/17  
148/18 152/25 173/17 175/19 176/5 185/14  
191/16  
**yellow** [1] 76/6  
**yep** [1] 10/14  
**yes** [274]  
**yesterday** [9] 4/6 4/16 4/22 5/5 13/12  
17/10 124/11 124/20 190/1  
**yesterday's** [1] 124/17  
**yield** [1] 140/17  
**York** [3] 121/10 121/11 151/8  
**you** [807]  
**you'd** [2] 48/18 86/2  
**you'll** [7] 3/6 11/19 18/19 34/25 59/24  
82/15 104/20  
**you're** [51] 4/9 6/3 11/11 14/6 14/21  
17/10 17/12 17/17 18/22 23/10 23/16  
25/20 43/12 47/16 55/12 58/1 59/22 60/7  
62/3 65/7 65/8 65/9 73/17 77/8 77/24  
80/24 103/16 103/19 104/5 114/15 114/17

115/7 115/12 120/15 124/13 128/1 133/10  
133/13 136/9 141/21 146/12 149/13 158/9  
161/1 161/11 161/11 185/8 185/8 185/17  
189/18 191/16  
**you've** [17] 5/12 12/24 15/19 29/25 49/2  
55/13 74/18 82/12 113/8 116/17 142/11  
142/14 143/12 146/6 153/19 154/4 154/17  
**young** [9] 5/17 38/13 98/20 125/7 125/20  
135/23 136/1 139/21 191/13  
**younger** [1] 191/11  
**your** [307]  
**yours** [1] 41/19  
**yourself** [5] 66/8 66/9 66/15 66/25 128/2

**Z**  
**zones** [1] 90/11  
**zoom** [1] 124/17  
**Zumwalt** [4] 171/5 174/23 180/18 183/20